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No. 1

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,

v.

THE FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission ("FERC") has statutory authority to regulate transmission providers' use of State-granted eminent domain power, and if so, whether the provisions of FERC *Order No. 2003* that effectively commandeer this core State function are barred by the Tenth Amendment of the United States Constitution?

2. Whether the FERC's extension of its statutory authority over *transmission facilities* and wholesale sales of electric power to regulate *physical* interconnections between *generation and local distribution facilities* is barred by Federal Power Act Section 201(b)(1), which specifies the FERC shall not have jurisdiction "...over facilities used for the generation of electric energy or over facilities used in local distribution?"

3. Whether the FERC's acceptance of a facially inadequate method for identifying when State-jurisdictional distribution facilities are "subject to an Open Access Transmission Tariff" results in arbitrary and capricious action?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to *Supreme Court Rule 29.6*, Petitioners state:

The National Association of Regulatory Utility Commissioners ("NARUC") was founded in 1889. Congress and the courts have consistently recognized NARUC as a proper entity to represent the generic interests of the State utility commissions[1] in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands that oversee the activities of telecommunications, energy, and water utilities. NARUC's members have State law obligations to ensure that energy utility services required by the public convenience and necessity are established, maintained, and provided at rates and conditions that are just, reasonable and nondiscriminatory. NARUC is a non-profit corporation with no parent companies, subsidiaries or affiliates that have issued securities to the public. No publicly traded company owns any equity interest in NARUC.

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[1] Congress, at 47 U.S.C. §410(c) (1971), calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of carriers and utilities. Under § 410(c), NARUC nominates members to Federal-State Boards which provide recommendations a federal agency must act upon. Cf. 47 U.S.C. § 254 (1996) (describing functions of the Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "Carriers, to get the cards, applied to (NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued . . .") (emphasis added).

Co-Petitioners the Alabama Public Service Commission; the Public Utilities Commission of the State of California; the Public Service Commission of the Commonwealth of Kentucky; the North Carolina Utilities Commission; and the South Carolina Office of Regulatory Staff[2] are State governmental entities and are not required to file a Rule 29.6 statement.

Although the Washington Utilities and Transportation Commission; Consolidated Edison Company of New York, Inc.; Southern Company Services, Inc.; Orange & Rockland Utilities, Inc.; and Arizona Public Service Company were Co-Petitioners below, they have decided not to join this Petition.

Along with Petitioners, the following were also parties to the District of Columbia Circuit proceedings below: Alliant Energy Corporate Services, Inc.; Ameren Services Company; American

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[2] The South Carolina Office of Regulatory Staff ("ORS") was created by an Act of the South Carolina General Assembly, 2004 Act No. 175, signed into law on February 18, 2004. Under Act 175, the ORS is a party of record in all filings, applications and proceedings before the South Carolina Public Service Commission and is charged with balancing the concerns of the using and consuming public with the preservation of the financial integrity of the State's public utilities and economic development and job retention in the State of South Carolina. S.C. Code Ann. Section 58-4-10 (Supp. 2004). The ORS has additionally been charged under S.C. Code Ann. Section 58-4-50(A)(8) (Supp. 2004) to "provide legal representation of the public interest before State courts, federal regulatory agencies, and federal courts in proceedings that could affect the rates or service of any public utility."

Forest and Paper Association Inc.; Arizona Public Service Co.; California Electricity Oversight Board; Calpine Corp.; Central Illinois Light Co.; Central Illinois Public Service Co.; Central Maine Power Co.; Cincinnati Gas & Electric Co.; Cinergy Services, Inc.; City Of Los Angeles Department Of Water and Power; City Water, Light & Power, Springfield, Il; Consolidated Edison Co. of New York, Inc.; Duke Energy Corp.; Electric Power Supply Association; Florida Public Service Commission; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Co.; Intergen Services, Inc.; Interstate Power and Light Co.; Kentucky Utilities Co.; Large Public Power Council; LG&E Energy Corp.; Lincoln Electric System; Louisiana Public Service Commission; Louisville Gas and Electric Co.; Midwest Independent Transmission System Operator, Inc.; Midwest ISO Transmission; Midwest ISO Transmission Owners; Montana-Dakota Utilities Co.; New York State Electric & Gas Corp.; Northern States Power Co.; Northern States Power Co. (Wisconsin); Northwest Wisconsin Electric Co.; Oklahoma Gas and Electric Co.; Orange and Rockland Utilities Inc.; Otter Tail Corp.; Pacificorp; PSI Energy, Inc.; Rochester Gas and Electric Corp.; Sacramento Municipal Utility District; Southern California Edison Co.; Southern Company Services, Inc.; Southern Illinois Power Cooperative, Inc.; Southern Indiana Gas & Electric Co.; Southwestern Public Service Co.; Superior Water Light & Power; Tenaska, Inc.; Tucson Electric Power Co.; Union Electric Co.; Union Light, Heat and Power Co.; Wabash Valley Power Association, Inc.; Washington Utilities and Transportation Commission; and Xcel.

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Relevant Excerpts from the FERC's *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 F.E.R.C. ¶61,103 (2003); Order No. 2003-A, 106 F.E.R.C. ¶61,220 (2004); and Order No. 2003-C, 111 F.E.R.C. ¶61,401 (2005).[3]

APPENDIX C A37
The United States Court of Appeals for the District of Columbia Circuit denied the Petitioners' Petition for Rehearing En Banc and entered judgment on June 20, 2007. A copy of Order is appended as APPENDIX C.

APPENDIX D A39
This case involves Sections 814, 824, 824a-4, 824p, 831c of the Federal Power Act, 16 U.S.C. §§ 791-839. APPENDIX D contains the text of these Sections.

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[3] Order No. 2003-B, 109 F.E.R.C. ¶61,287 (2004) is not included in **APPENDIX D**.

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BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals entered judgment on January 12, 2007. The Court of Appeals denied the Petitioners' Petition for Rehearing En Banc and entered judgment on June 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Sections 814, 824, 824a-4, 824p, 831c of the Federal Power Act, 16 U.S.C. §§ 791-839. APPENDIX D (Pet. App. A-39 *et seq.*) contains the text of these Sections.

CONCISE STATEMENT OF THE CASE

I. STATE REGULATION OF ELECTRIC UTILITIES AND DELEGATION OF EMINENT DOMAIN AUTHORITY.

Since 1920, States have exercised their inherent authority to pervasively regulate electric utilities providing retail service. Every State has a commission to assure adequate electric service at reasonable rates. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 n. 17 (1983). These commissions continue to exercise broad authority over electric utilities, granting and conditioning requests for certificates of public convenience and necessity. For example, as this Court has acknowledged:

> [S]tates . . . retain authority over *the*

> *need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction* of new nuclear plants by refusing on economic grounds to issue certificates of public convenience." Id., at 216. (emphasis added).

In conjunction with issuing certificates of public convenience and necessity, States often delegate their sovereign power of eminent domain to utilities, *but only to facilitate the specified utility's compliance with State-deliniated public service obligations.* See, e.g., *Handley v. Cook*, 252 S.E.2d 147, 149 (W. Va. 1979) ("The Legislature . . . to make power available has conferred upon electric power companies the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations, the right and duty of performing a public service."); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 368 n.1 (1974) (Marshall, J., dissenting) (Under Pennsylvania statute, the certificate of public convenience confers certain eminent domain rights upon the company, whose rates, facilities and services are subject to *continuous State supervision.*)

As Judge Sentelle points out in his dissent below:

> Courts have also emphasized that even if eminent domain authority has been delegated to a public utility or a privately-owned corporation, it is still the State that is acting whenever the eminent domain power is used: . . . The

> right of eminent domain is an attribute of sovereignty. It is none the less a public right, because the State sometimes consents that it may be exercised by a quasi public corporation like a common carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest.... It permits them to proceed in their own names, but really on behalf of the State...(emphasis added and in the original.) *National Association of Regulatory Utility Commissioners v. FERC,* 475 F.3d 1277, 1287-88 (D.C. Cir. 2007) (Pet. App. A-27.)

II. FEDERAL REGULATION OF ELECTRIC UTILITIES.

A. FEDERAL WATER POWER ACT (1920).

In 1920, Congress passed the Federal Water Power Act, 16 U.S.C. §§ 791 – 823. This legislation created the Federal Power Commission ("FPC"), the FERC's predecessor agency,[4] and gave the new agency jurisdiction to license hydroelectric generation facilities located along "the navigable waters of the United States." From 1920 until 1935, the agency's authority over electric utilities remained limited to such hydroelectric facilities.

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[4] Hereinafter, all references to the "FERC" will encompass both the FPC and the FERC.

B. FEDERAL POWER ACT (1935) [5]

When Congress enacted the Federal Power Act ("FPA") in 1935, 16 U.S.C. §§ 791-839, it expanded the Federal government's oversight of electric utilities to include the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.

III. CONGRESS LIMITS THE FERC'S AUTHORITY.

A. CONGRESS SPECIFIES NO FERC JURISDICTION OVER DISTRIBUTION OR GENERATION FACILITIES.

Congress could have treated generation, transmission, distribution and consumption of electric energy as if they were all transmission-related and subject to FERC jurisdiction. Instead, Congress chose to *expressly preserve*, in FPA Section 201(b)(1), 16 U.S.C. § 824(b)(1), *States' existing jurisdiction* over retail electric service and local distribution and generation facilities, while providing the FERC with jurisdiction over wholesale electric sales and transmission service.[6]

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[5] In 1935, the provisions of the Federal Water Power Act became subchapter I of the "Federal Power Act." See 16 U.S.C. § 791a.

[6] See generally, *Connecticut Light & Power Company v. Federal Power Commission,* 324 U.S. 515, 525-530 (1945) (explaining at 530 that "Congress is acutely aware of the ...vitality of these [S]tate governments. It sometimes is moved to respect [S]tate rights . . . even when some degree of efficiency of a Federal plan is thereby sacrificed . . . It may, too, think it

FPA Section 201(b)(1), in unmistakably "clear and unambiguous text," ***flatly prohibits*** federal regulation of *generation facilities and local distribution facilities*, stating, in pertinent part:

> (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but ***shall not*** have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution . . .

16 U.S.C. § 824(b)(1) (emphasis added).[7] (Pet. App. A-41)

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wise to keep the hand of [S]tate regulatory bodies in this business, for . . . [S]tates' are still laboratories where many lessons in regulation may be learned . . . without involving a whole national industry." By preserving the sovereign status of the States, the FPA, in many ways, reflects the federal system established by the U.S. Constitution, which relies upon a healthy balance of power between the States and Federal Government. See *Gregory v. Ashcroft*, 501 U.S. 452, 457-458 (1991). The "federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society [and] it allows for more innovation and experimentation in government." Id. *at 458.*

[7] The single exception, as noted supra, remains hydroelectric *generation facilities* over which the FERC retained jurisdiction in the previous subchapter (i.e., subchapter I) of the FPA, 16 U.S.C. §§ 791 -823b.

For over seventy years, Courts have consistently reaffirmed these jurisdictional limits on FERC's authority. *Transmission Access Policy Study Group v. FERC,* 225 F.3d 667, 690-91, 695-96 (D.C.Cir.2000) ("*TAPSG*"), aff'd sub nom. *New York v. FERC,* 535 U.S. 1, 21-23 (2002) ("*New York*"). Indeed, even the FERC, in its landmark *Order No. 888,*[8] specifically acknowledges the Section 201(b)(1) constraints on its jurisdiction[9] by developing a

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[8] *Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Services by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶31,036, 61 Fed. Reg. 21,540 (1996), clarified, 76 FERC ¶61,009, 1996 WL 363765 and 76 FERC ¶61,347, 1996 WL 799257 (1996), on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶61,182, 1997 WL 257595 (1997), on reh'g, *Order No. 888-B,* 81 FERC ¶61,248, 62 Fed. Reg. 64,688, 1997 WL 833250 (1997), *on reh'g,* Order No. 888-C, 82 FERC ¶61,046, 1998 WL 18148 (1998), aff'd in part and remanded in part sub nom. *TAPSG,* 225 F.3d 667, aff'd sub nom. *New York,* 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47.

[9] The FERC found utilities were unlawfully using their monopoly control over interstate transmission to undercut wholesale energy sales by potential competitors. See generally *TAPSG,* 225 F.3d at 681-83. To correct this problem, the FERC required wholesale transmission of electric energy to be unbundled from power sales. *Order No. 888* at 31,635-36. The FERC required utilities to file "open access" tariffs containing prescribed minimum terms and conditions. Id. *Order No. 888* also specified that if a State agency ordered "unbundling" of retail transmission, open access requirements applied to unbundled retail transmission service as well. Id. The FERC concluded that, pursuant to FPA §201(b)(1), it had jurisdiction over the interstate transmission of electric energy to any wholesale or unbundled retail customer. *Order No. 888* at 31,980; *New York,* 535 U.S. at 11. The FERC realized that

"seven-factor test"[10] to determine *when* specified plant (involved in unbundled retail "wheeling")[11] is a *local distribution facility* over which FERC has no jurisdiction - or a *transmission facility* over which FERC does have jurisdiction. *Order 888* at 31,770-71,31,981; *New York,* 535 U.S. at 23; *TAPSG,* 225 F. 3d at 695.

B. CONGRESS LIMITS FERC EMINENT DOMAIN AUTHORITY AND PROVIDES NO STATUTORY AUTHORITY TO CONDITION STATE EMINENT DOMAIN POWER.

In the FPA, 16 U.S.C. §§ 791- 839, Congress provided eminent domain authority to the electric

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unbundled retail "wheeling" (the collective process of transmission and distribution) could involve service over transmission facilities, as well as service over local distribution facilities. *Order No. 888* at 31,980.

[10] The seven-factor test considers the following: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems, it rarely if ever, flows out; (4) when power enters a local distribution system it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographic area; (6) meters are based at the transmission-local distribution interface to measure flows into the local distribution system; and (7) local distribution systems operate at reduced voltage. *Order No. 888* at 31,981.

[11] Retail wheeling is the movement of electricity, owned by a power supplier and sold to a retail consumer, over transmission and distribution lines owned by neither. A fee is charged by the owners of the lines for letting others use them. A "wheeling charge" is levied for both transmission and distribution line "rental."

utilities regulated by the FERC only in limited circumstances. The only provisions in the FPA granting eminent domain authority for generation facilities apply to *hydroelectric* generation facilities.[12]

Even in the area of transmission facilities, the FERC's authority to certify facilities or grant eminent domain authority is *limited and strictly circumscribed.* See FPA, 16 U.S.C. § 824a-4(a) (granting the Department of Energy ("DOE"), in tandem with FERC, limited authority to use eminent domain to acquire rights-of-way "through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada") (Pet. App. A-44, A-45) and 16 U.S.C. § 824p(e) (granting federal eminent domain authority to certain licensees to build transmission facilities in "national interest electric transmission corridor[s] designated by the DOE"). (Pet. App. A-52)

The FERC's lack of eminent domain authority for non-hydroelectric generation facilities is not surprising. It would not be logical for Congress to expressly prohibit the exercise of FERC jurisdiction

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[12] *See* 16 U.S.C. § 814, granting eminent domain authority to certain licensees to acquire land "necessary to the construction, maintenance, or operation of any dam, reservoir, (Pet. App. A-39) diversion structure, or the works appurtenant thereto," and 16 U.S.C. § 831c(h)-(i), authorizing the TVA to use eminent domain to "acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River". (Pet. App. A-61)

over local distribution and generation facilities in FPA Section 201(b)(1) and then turn around and provide eminent domain authority to site such facilities.

IV. *ORDER NO. 2003* - FERC IGNORES CLEAR CONGRESSIONAL AND CONSTITUTIONAL CONSTRAINTS ON ITS AUTHORITY.

Order No. 2003 requires public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised open access transmission tariffs containing standard *generator* interconnection procedures and a standard interconnection agreement specified by FERC and to provide interconnection service to devices used for the production of electricity having a capacity of more than 20 megawatts under them.[13]

Prior to *Order No. 2003*, the Commission had addressed interconnection issues on a case-by-case basis. This approach ensured that non-jurisdictional *generation* and *local distribution facilities* were not unlawfully subjected to FERC jurisdiction.

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[13] In a separate rulemaking, the FERC established procedures and an interconnection agreement applicable to Small Generators (any energy resource having a capacity of no more than 20 megawatts, or the owner of such a resource) that seek to interconnect to jurisdictional Transmission Providers. *See Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006*, 111 FERC ¶61,220 (2005). That rulemaking is currently under review before the United States Court of Appeals for the D.C. Circuit in the case captioned *Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 06-1031 et al.(consolidated).

In *Order No. 2003*, the FERC correctly and directly concedes it "may not regulate the *'local distribution facility' itself,* which remains State jurisdictional . . ." because that would violate the FPA. It contends it is only regulating a "wholesale transaction."[14]

However, the order then paradoxically *specifically extends* federal jurisdiction to the siting, construction, equipment, engineering, and procurement of the physical interconnection between *generating facilities* and *local distribution facilities*. A physical interconnection to a distribution line is *not* the sale of energy at wholesale.

The impact of the FERC's decision on the physical plant associated with generator facilities is clear. Article One of the Large Generation

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[14] See *Order No. 2003-C* at ¶53:

> "Because the Commission's authority to regulate in this circumstance is limited to the wholesale transaction, **we conclude that *we do not have the authority to directly regulate the facility that is used to transmit the energy being sold at wholesale.*** In other words, while the Commission may regulate the entire transmission component . . . of the wholesale transaction – whether the facilities used to transmit are labeled "transmission" or "local distribution"– ***it may not regulate the local distribution facility itself, which remains State jurisdictional.*** We believe this properly respects the boundaries drawn in the FPA." (emphasis added). (Pet. App. A-35, A-36)

Interconnection Agreement ("LGIA"), adopted in *Order No. 2003,*[15] states:

> Interconnection Facilities include all *facilities and equipment* between the Generating Facility and the Point of Interconnection, *including any modifications, additions, or upgrades that are necessary to physically and electrically interconnect the Generating facility* . . . (emphasis added).

Similarly, Section 8.2 of the Large Generation Interconnection Procedures ("LGIP") adopted in the same order states:

> The Interconnection Facilities Study shall specify and estimate the cost of the equipment, engineering, procurement and construction work needed to... *physically and electrically connect the Interconnection [distribution] Facility...* (emphasis added).

The FERC's proffered justification for this jurisdictional grab - a "transactional dual use" of the facilities – was rejected by a prior panel of the D.C. Circuit in a related case. As the D.C. Circuit explains:

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[15] The FERC requires this LGIA to be (i) appended to every jurisdictional transmission providers Open Access Transmission Tariff and (ii) executed on an individual basis to memorialize the terms and conditions of interconnection for a new generator (or modification of an existing generator) with generating capability of greater than 20 MW.

> *Order No. 2003* asserts jurisdiction over the terms of interconnection between generators and transmission providers, even where the transmission facility also engages in local distribution, but only insofar as the interconnections are "for the purpose of making sales of electric energy for resale in interstate commerce." *NARUC v. FERC,* 475 F. 3d 1279-80. (Pet. App. A-9.)

Order No. 2003 also ignores the fact that Congress has not authorized the FERC to interfere with the use of State-granted eminent domain power. According to *Order No. 2003-A*, 69 Fed. Reg. 15,932, 15,953-54, 16,033 (2004), transmission providers must – acting as an agent of the State – use their imminent domain authority to help non-utility generators obtain necessary land for interconnection facilities. Specifically, transmission providers:

> shall at Interconnection Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its affiliates, including use of its [State granted] eminent domain authority." Id. (emphasis added).

Following the submission of successive rehearing requests, FERC issued *Orders Nos. 2003-A* (March 5, 2004), *2003-B* (December 20, 2004), and *2003-C* (June 16, 2005), which primarily affirmed,

with some exceptions, *Order No. 2003's* LGIP and LGIA.

V. THE D.C. CIRCUIT'S REVIEW.

Petitioners filed timely requests for rehearing of FERC's July 24, 2003 *Order No. 2003,* and subsequently sought review of the order before the United States Court of Appeal for the District of Columbia Circuit. The jurisdiction of that Court arose under 16 U.S.C. § 825(l)(b). Ultimately, two D.C. Circuit Judges voted to uphold *Order No. 2003's* commandeering of State-granted eminent domain requirements over the vigorous dissent of Judge Sentelle.

Ignoring voluminous case law defining the character of this most coercive State authority, the purpose private entities are delegated this power, and the special status of any entity exercising it - the majority analyzed the issue *de novo* and found FERC's authority to cure undue discrimination sufficient *because there was no significant infringement on State's exercise of eminent domain authority.* According to the majority, FERC was purportedly merely regulating the utilities' actions – giving no real consideration to the fact that these utilities stand in the shoes of the State wielding a State power constrained by State conditions and oversight.

Unable to find specific statutory authorization to condition the exercise of a State agent wielding State eminent domain authority, the majority below contends the FERC order merely:

> conditionally, *compel[s] the* utility either *to broaden its use of the State-provided authority for the benefit of independents,* or to drop the use for its own and its affiliates' power. But the modifier *conditionally* is critical. Nothing in the federal rule compels either continued State retention of the license, or public utilities' continued employment of eminent domain. The intrusion on state power is surely no greater than (many would say dramatically less than) that of a federal command that, if a state hires employees for the performance of traditional governmental functions, it must pay them no less than a federally determined wage...*the orders here leave State law completely undisturbed and bind only utilities-not State officials.* (emphasis added). (*NARUC v. FERC,* 475 F. 3d at 1283)(Pet. App. A-18)

Whatever this Court concludes about the majority's analysis, two things are clear: The FERC's rules do in fact bind authorized agents of the State; and, telling an agent of a State government how and when one of the most coercive of States' sovereign powers is to be exercised - that of condemning property for public use - is "surely" a dramatically greater intrusion on State sovereign authority than an agency complying with a federal minimum wage law.

As noted, supra, the entire panel adopted FERC's flawed rationale on the remaining jurisdictional issues. *See* Pet. App. A-9, A-16. In June, the D.C. Circuit denied Petitioners' Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

The significant statutory and constitutional issues concerning the interaction between federal and State authorities, as well as the practical policy implications and potential impact on safety and reliability of electric service, raised by the decision below present a compelling case for granting certiorari. The D.C. Circuit's affirmation of the FERC's flawed decision falls within the contours of the general guidelines justifying review outlined in Supreme Court Rule 10 (a) and (c).

Specifically, the decision of the D.C. Circuit raises fundamental constitutional issues about a federal agency's ability to direct the use of State's eminent domain authority.

The decision also raises important issues concerning a federal agency's ability to ignore clear Congressional proscriptions, as well as the clear import of decisions of this Court, to significantly expand its jurisdiction.

For the first time in the 87 years of federal regulation of the electric power industry, the FERC, without additional statutory authorization, has divested the States of control over generation and

distribution facilities in contravention of the unambiguous dictates of the Federal Power Act.

Assuming arguendo there is no Tenth Amendment bar, the decision also permits FERC to condition State eminent domain authority with no express statutory authorization.

Moreover, the D.C. Circuit, in justifying these significant expansions of the FERC's authority, has rendered a decision, which conflicts with numerous precedents of not only this Court, but those of other Circuits and State Supreme Courts.

These are not just academic questions. Aside from the weighty federalism and separation-of-powers issues raised by FERC's usurpation of State and Congressional authority, there are also practical impacts flowing from the D.C. Circuit's decision as well.

The Court's endorsement of this flawed FERC decision will have an undeniable and critical impact nationally on State efforts to facilitate connection of alternative generation to local distribution plant and to otherwise regulate State-jurisdictional utilities in a manner consistent with State law.

A number of safety, reliability, and resource adequacy considerations are also impacted by the D.C. Circuit's decision to confirm *Order No. 2003*.[16]

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[16] The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), added Section 215(i)(2), 16 U.S.C. §824o(b)(1), to the FPA. That section gives the FERC authority to set

States retain the responsibility for ensuring the safe, reliable, and adequate delivery of electricity service to retail customers. Electric service is delivered through distribution facilities directly and physically connected to customers' homes and businesses. The physical interconnection of a generator to distribution facilities necessarily impacts the operation of these facilities and, thus, the safety, reliability, and adequacy of electric service to retail customers.

Finally, even the majority recognized the potential for uncertainty prompted by the difficulty of determining which distribution facilities are covered by the FERC's Open Access Transmission

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reliability standards for the bulk-power system. However, Congress denied FERC any authority to order the construction of additional generation or other facilities In implementing FPA Section 215, the FERC conceded the clear Congressional intent to limit the FERC's new jurisdiction over reliability. For example, in defining the term "reliability standard" as used in FPA Section 215(a)(3), 16 U.S.C. § 824o(a)(3) the FERC said that this term does not include any requirement to enlarge or construct new generation capacity. In *Order No. 672*, which adopted the Final Reliability Rule, FERC recognized the important role that States play in regulating many aspects of electric reliability, such as ensuring that State franchised utilities meet their obligation to construct enough capacity to ensure that they remain able to provide the public with reliable electric service. *Order No. 672*, 114 FERC ¶ 61,104 (2006) at 813. The reliability responsibilities left to the States generally include requiring franchise utilities to make adequate investment in new generation, distribution, and transmission infrastructure, and, to develop adequate demand response as needed to help keep generation and load in balance. Id. Obviously, assuring generation resource adequacy to retail customers is a fundamental aspect of reliable service.

Tariffs ("OATT") and which are not. The Court below dismisses the problem by merely stating that it sees no grounds for upsetting the FERC's judgment, even though FERC concedes that there is no simple method of deciding what facilities are subject to an OATT. The difficulty of enforcement in some instances and the probability of forum shopping in others are just two more reasons why the Supreme Court should take this case up for review.

I. THE D.C. CIRCUIT'S CONFIRMATION OF FERC AUTHORITY TO INTERFERE WITH STATE-GRANTED EMINENT DOMAIN POWER ADDRESSES *DE NOVO* A SIGNIFICANT CONSTITUTIONAL /FEDERALISM ISSUE AND CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT OF APPEALS AND STATE COURT PRECEDENT.

A. THE D.C. CIRCUIT'S ANALYSIS CONFLICTS WITH DECISIONS OF OTHER COURTS BY TREATING THE FERC INTERFERENCE WITH STATE'S SOVEREIGN POWER OF EMINENT DOMAIN AS MERE REGULATION OF AN ELECTRIC UTILITY COMPANY.

The D.C Circuit, by a 2-1 vote erroneously determined that *Order No. 2003's* requirements conditioning how utilities must exercise their State-regulated eminent domain powers – *is not regulation of the State's authority*, but only binds utilities. See *Pet. App. A -17, A-18.* [17]

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[17] *Order No. 2003* requires that transmission providers "shall at Interconnection Customer's expense use efforts,

This sophistry cannot disguise the fact that utilities exercising eminent domain authority, *are acting as agents of the State* - under a carefully conditioned certificate subject to State supervision and oversight. "[B]y exercising the delegated power of eminent domain, *a public service corporation acts as an agent of the State . . .*" *Baldwin v. Appalachian Power Co.*, 556 F.2d 241, 242 (4th Cir. 1977). (emphasis added).[18]

Not only was there a split among the members of the D.C. Circuit panel responsible for deciding this issue, with Judge Sentelle writing a vigorous dissent (Pet. App. A-24-31), but the majority's decision below conflicts with decisions of this Court, the Fourth Circuit (supra), and State Supreme Courts.

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similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its Affiliates, including use of its eminent domain authority." *Order No. 2003-A*, 69 Fed. Reg. 15,932, 15,953-54, 16,033 (2004). To the extent providers use eminent domain to interconnect with their own generation facilities, they must now also use that authority on behalf of unaffiliated generators.

[18] *Louisville & N.R. Co. v. W. Union Tel. Co.*, 268 F. 4, 8 (6th Cir. 1920) ("It is none the less a public right, because the State sometimes consents that it may be exercised by a quasi public corporation, like a common carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest. . . . It permits them to proceed in their own names, but really on behalf of the State."). *Louisiana v. Chambers Inv. Co.*, 595 So.2d 598, 601 (La. 1992) ("[Eminent domain] always involves the taking or damaging of property interests by the state or some alter ego of the state, such as a public utility, that has been delegated the power to condemn.").

The Majority's reasoning is premised on the notion that an electric utility can use its delegated eminent domain authority for other entities or for matters different than the service upon which the certificate was based.

It cannot. See, e.g., *Chugach Elec. Ass 'n, Inc. v. Regulatory Comm'n of Alaska,* 49 P.3d 246, 253 (Alaska 2002) (Utility requires an additional certificate prior to providing an additional type of service.)

No private company has a right to eminent domain authority. Those granted the responsibility, find the grant comes with clear conditions and oversight. The majority's claim that FERC's rules "*...bind only utilities- not State officials*" ignores the fact that the exercise of eminent domain authority by *any entity*, is the essence of States' sovereignty. As this Court declared in *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924): "The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. . . . [T]he power is deemed to be essential to the life of the State. *It cannot be surrendered*, and if attempted to be contracted away, it may be resumed at will." (emphasis added).[19]

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[19] Indeed, the archetype for when a utility's actions are considered the actions of the State is when the utility exercises the State's sovereign power of eminent domain. See e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345 at 353 (1974) (declining to find that an electric utility's termination of a customer's power is a State action while noting: "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated

The majority's analysis, by essentially ignoring the fact that the *utility is the State* when it exercises eminent domain authority, is in direct conflict with these decisions.

B. THE D.C. CIRCUIT DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT REQUIRING AN UNMISTAKABLY CLEAR GRANT OF AUTHORITY BEFORE FERC CAN DICTATE THE MANNER STATE SOVEREIGN POWERS ARE EXERCISED.

There is no specific statutory authority that permits *Order No. 2003's* restrictions on transmission providers' use of State-granted eminent domain power. By upholding these requirements, the decision conflicts with long-established Supreme Court precedent.

As Judge Sentelle emphasized in his dissent from the majority, FERC is a "creature of statute;" the agency has "*only* those authorities conferred upon it by Congress."[20] In 2004, this Court reached

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with sovereignty, such as eminent domain, our case would be quite a different one."); see also *Louisiana v. Chambers Inv. Co.*, 595 So.2d 598, 601 (La. 1992). ("Eminent domain...always involves the taking or damaging of property interest by the state, or some alter ego of the state, such as a public utility, that has been delegated the power to condemn.")

[20] See *NARUC v. FERC*, 475 F. 3d at 1286, Pet. App. A-24, citing *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004) (Internal quotation marks omitted.) ("As a federal agency, FERC is a 'creature of statute,' having

the same conclusion by stating that, "if there is no statute conferring authority, FERC has none."[21]

Moreover, this Court has specified that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute."[22] Courts may not presume that Congress has intended to regulate the "substantial sovereign powers" of States unless the federal statute in question is unmistakably clear.

There is no question that States' eminent domain authority and the delegation of this authority to utilities involve State sovereign powers.

It is also true, as Judge Sentelle observes in his dissent, nowhere does FERC refer to any statutory provision whereby Congress has addressed the States' exercise of its sovereign power of eminent domain, much less an "unmistakably clear' one authorizing FERC to regulate or preempt States' use of it. *NARUC v. FERC,* 475 F. 3d at 1288. (Pet. App.

'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'")

[21] Id. This case follows a clear line of precedent consistently finding that a federal "... agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986).

[22] *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (Internal quotation marks omitted.) (emphasis added).

A-28)

The majority decision below carries the same frailty. It also fails to locate or refer to any statutory provision authorizing FERC to interfere with the exercise of States' sovereign power of eminent domain. Nor does it meaningfully address any of the cases cited by Judge Sentelle. Instead of attempting to identify any such clear statement in the relevant statutes, the majority decision follows FERC lead. FERC points to its statutory authority to remedy undue discrimination as the basis for ordering use of State condemnation authority.

However, the FERC's general authority to redress undue discrimination in no way supports the expansion of FERC's authority to reach State eminent domain power.

Congressional treatment of eminent domain in other provisions of the FPA confirms *when Congress addresses issues involving eminent domain; it tends to do so in a clear, detailed, and specific manner.* See FPA 16 U.S.C. §§ 814, 824a-4(a), 824p(e) and 831c(h)-(i). (Pet. App. A-39 et seq.)

If Congress wanted to grant FERC or independent generators eminent domain authority, Congress was capable of doing so. The fact is - Congress did not choose to grant FERC such independent authority, let alone authorize FERC to regulate the States' eminent domain authority.

C. THE D.C. CIRCUIT DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS

PROHIBITING THE FEDERAL GOVERNMENT FROM COMMANDEERING STATE EMINENT DOMAIN AUTHORITY TO ENFORCE A FEDERAL PROGRAM.

Even if Congress had chosen to pass a law allowing FERC to harness the State's eminent domain power, such a law would have been an unconstitutional infringement on core State functions. The Tenth Amendment of the United States Constitution bars the federal government from compelling the States to enact and enforce federal regulatory programs.[23] *See New York v. United States*, 505 U.S. 144, 161(1992).

That is precisely what FERC is attempting to do here.

The FERC and majority's reliance on generic FPA provisions that prohibit utilities from engaging in undue discrimination carries the same constitutional frailty.

Under the D.C. Circuit's decision, a utility can no longer seek or exercise eminent domain authority unless it also seeks, obtains and exercises eminent domain authority for independent generators.

In addition to potentially interfering with the utility's public service obligation, this decision significantly undermines the States' authority and

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[23] The Tenth Amendment states that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

interferes with its legislative processes. The decision will also impose significant burdens on State resources.

The majority states that the FERC's orders "conditionally, compel the utility to broaden its use of the State-provided authority for the benefit of independents, or to drop the use for its own and its affiliates' power." See Pet. App. A-18. But as noted, supra, a utility does not have the authority to broaden its use of the States' eminent domain powers. Rather, many will have to apply for additional certificate authority from the State to assist an independent generator condemn land. This compels the use of extensive State resources to conduct proceedings on applications for new certificates of public convenience and to complete the related necessary environmental reviews. These requirements on the utilities' future use of the States' eminent domain authority will also raise a range of issues that State commissions will be forced to address in the certificate proceedings.

State commissions perform a legislative function when they conduct certificate proceedings, because, like ratemaking proceedings, the certificate proceedings are determining what is in the public interest in the future. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 370-71 (1989); *see also The Mounting States Telephone and Telegraph Co. v. The Public Utilities Commission of the State of Colorado,* 576 P.2d 544, 547 (Co. 1978).

The Court's decision below runs afoul of the

Tenth Amendment by allowing federal requirements to be imposed upon the States' legislative process. The States cannot be compelled to follow federal requirements under these circumstances, nor can they be required to "enact or administer a federal regulatory program."[24] See generally *Printz v. United States*, 521 U.S. 898, 926-29 (1997).

II. THE D.C. CIRCUIT'S DETERMINATION THAT FERC HAS AUTHORITY TO REGULATE THE PHYSICAL INTERCONNECTION BETWEEN STATE JURISDICTIONAL LOCAL DISTRIBUTION FACILITIES AND GENERATION FACILITIES RAISES IMPORTANT FEDERALISM ISSUES AND CONFLICTS WITH SUPREME COURT, AS WELL AS OTHER FEDERAL AND STATE COURT PRECEDENT.

A. THE D.C. CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING JURISDICTION OVER LOCAL DISTRIBUTION FACILITIES.

The D.C. Circuit's unprecedented decision to uphold FERC's attempt to regulate generator interconnections with local distribution facilities is fundamentally inconsistent with the dual Federal-State regulatory regime embodied in the FPA.

As pointed out at length, supra at pages 21-23, this Court has consistently ruled that a Federal agency's jurisdiction is limited to that authorized by

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[24] *New York*, 505 U.S. 144, 188.

statute. *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 374 (1986). The FERC, "[a]s a federal agency ... is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" *California Independent System Operator Corporation v. Federal Energy Regulatory Commission,* 372 F.3d 395, 398 (D.C. Cir. 2004) ("CAISO") (citations omitted).[25]

This Court has also explicitly recognized that the FERC's jurisdiction does not include local distribution facilities. The relevant statutory text is clear and unambiguous. FPA Section 201(b)(1) expressly *precludes* FERC from exercising jurisdiction over local distribution facilities and generation facilities. As this Court explained in *Federal Power Commission v. Florida Power & Light Co.,* 404 U.S. 453, 468 (1972), the FPA's recognition of exclusive State jurisdiction over local distribution facilities amounts to a legal standard that the agency [the FERC] must recognize and the courts must enforce. *Florida Power & Light,* 404 U.S. 453, 467.

Moreover, this Court has already rejected precisely the sort of unlawful assertion of FERC

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[25] In *CAISO,* the D.C. Circuit concluded "if there is no statute conferring authority, FERC has none." Id., *see also New York v. FERC,* 535 U.S. 1, 18 (2002) (stating that " the best way to answer such a question - *i.e.,* whether federal power may be exercised in an area of pre-existing [S]tate regulation - 'is to examine the nature and scope of the authority granted by Congress to the agency' ").

jurisdiction that the States have challenged in this case. Referencing the plain text of FPA Section 201(b)(1), the Supreme Court stated:

> [I]t is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.'" *Conn. Light & Power Co*, 324 U.S. 515, 528-29.[26]

The D.C. Circuits decision lacks this Court's skepticism. It simply ignores the same express statutory prohibition to uphold a FERC Order that unlawfully extends federal jurisdiction to cover physical interconnections between State-jurisdictional generation facilities and local distribution facilities.

B. THE D.C. CIRCUIT'S DECISION BELOW IS IN DIRECT CONFLICT WITH A LEADING DECISION OF THE ELEVENTH CIRCUIT ON THE SAME ISSUE.

The D.C. Circuit's decision below conflicts with a key decision of the Eleventh Circuit on the issue of whether the FPA authorizes FERC to regulate State-jurisdictional facilities used for the generation of electricity or over facilities used in local distribution.

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[26] Id. at 531, where this Court further stated that "The expression 'facilities used in local distribution' is...a limitation on jurisdiction and a legal standard that must be given effect...in addition to the technological transmission test." *Conn. Light & Power Co.*, 324 U.S. 515, 531. (emphasis added).

In *Southern Co. v FCC*, 293 F.3d 1338 (11th Cir. 2002), a group of electric utility companies challenged guidelines of the Federal Communications Commission ("FCC") implementing amendments to the Pole Attachments Act ("PAA"), 47 U.S.C. § 224. A critical element of the Eleventh Circuit's decision was whether the FCC exceeded its jurisdiction by asserting that the PAA applied not only to electric utilities' FERC-jurisdictional transmission systems, *but also to State-jurisdictional distribution systems.*

Citing FPA Section 201(b)(1), the Eleventh Circuit concluded that "the Federal Power Act explicitly divests the FERC of regulatory jurisdiction 'over facilities used for the generation of electric energy or over facilities used in local distribution.'" *Southern Co. v FCC*, 293 F.3d 1338, 1344. The Eleventh Circuit went on to observe:

> This provision recognizes the essentially local character of distribution facilities and systems, as opposed to the primarily interstate character of electric transmission facilities. Regulation of the latter was to be implemented by the FERC, while regulation of the former was to be left primarily in the hands of [S]tate and local authorities. *This bifurcated regulatory structure is indicative of the accepted and fundamental distinction between a utility's transmission plant and its distribution plant.* Id. (emphasis added).

The Eleventh Circuit correctly states the key distinction between the respective roles of the FERC and the States in the regulation of the nation's electric system. The D.C. Circuit decision, if allowed to stand, undermines this key legal distinction by allowing the FERC to assert federal regulatory authority over what has been the exclusive regulatory preserve of the States - the physical interconnection of generators to State-jurisdictional distribution facilities.

C. THE D.C. CIRCUIT'S DECISION BELOW IS IN DIRECT CONFLICT WITH ITS OWN PRECEDENT IN *DETROIT EDISON CO. V FERC.*

The FERC attempts to justify its jurisdictional overreach in *Order No. 2003* on the grounds that it is only asserting jurisdiction over so-called "dual use" facilities, *i.e.*, facilities that provided both retail and wholesale distribution services and, then, *only to the extent that there were FERC-jurisdictional transactions* over those facilities.

The FERC's rationale illuminates several flaws in the D.C. Circuit's decision. First, as outlined in more detail supra at pages 10-12 and 31-36, the express terms of FERC's order goes beyond sales transactions and actually requires the physical interconnection of generation and local distribution facilities in specific ways.

The statute does not permit this result.

Indeed, the FERC has already conceded that the physical local distribution facilities remain State-jurisdictional and beyond its reach. See *Order No. 2003-C* at ¶ 53, where the FERC concludes "while the Commission may regulate the entire transmission component (rates, terms and conditions) of the wholesale transaction – whether the facilities are used to transmit are labeled "transmission" or "local distribution"- *it may not regulate the "local distribution" facility itself, which remains State jurisdiction.*" (emphasis added). FERC may have jurisdiction over certain financial transactions that take place over otherwise State-jurisdictional distribution lines, but the law is clear that the FERC does not have jurisdiction over those facilities in any other respect.

This problem of actual impact on State-jurisdictional facilities caused an earlier panel of the D.C. Circuit to, in 2003, specifically find that the adoption of this "dual use" rationale was inconsistent with the statutory text. The panel below has thus produced an opinion that directly conflicts with recent precedent from the same Circuit. See, Detroit *Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003))[27].

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[27] Id. The Court reasoned that the FERC's effort to rewrite the statute to exclude only "facilities used exclusively in local distribution" effectively eviscerates State jurisdiction over numerous local facilities, in direct contravention of Congressional intent. Id., (*citing New York*, 535 U.S. 1, 22 (recognizing "Congress' intent to preserve State jurisdiction over local facilities").

The D.C. Circuit attempts to distinguish *Detroit Edison,* by first asserting that "Order No. 2003 applied to jurisdictional transactions only." (Pet. App. A-10) This assertion assumes away the key predicate in question: whether the facility in question is in fact a State-jurisdictional distribution facility over which the FERC simply lacks jurisdiction, or a FERC-jurisdictional transmission facility. FERC may have jurisdiction over certain financial transactions that take place over otherwise State-jurisdictional distribution lines, but the law is clear that the FERC does not have jurisdiction over those facilities in any other respect. Put another way, while FERC may have transaction-specific authority over certain State-jurisdictional facilities in limited instances, it does not have jurisdiction over the physical facilities themselves. The FERC's decision, affirmed by the Court below, moves beyond the assertion of federal jurisdiction over isolated financial transactions to the underlying physical facilities themselves.

This distinction between "physical" facilities and "transactions" (*i.e.*, sales or similar financial arrangements) taking place using those same facilities is a critical one. *Order No. 2003* contains detailed construction, equipment, engineering and procurement requirements regarding local distribution facilities[28]. None of these specifications

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[28] LGIA, Article 1 under *Order No. 2003,* states: "Interconnection Facilities include *all facilities and equipment* between the Generating Facility and the Point of Interconnection, including any *modification, additions or upgrades that are necessary to physically and electrically interconnect* the Generating Facility..."; LGIP, Section 8.2

have anything to do with financial transactions. However, by adopting these detailed interconnection requirements, the FERC is unquestionably attempting to assert jurisdiction over the *actual* facility, not simply over a wholesale transaction or sale that may be taking place over the facility.

A sale of energy is simply *not* a construction project. Similarly, the physical siting of a generator and related facilities is not a sale. However, both FERC's *Order No. 2003*, and the decision below upholding it, fail to recognize the fundamental distinction between these financial transactions and a physical interconnection.

The D.C. Circuit attempts a further justification by parsing the words "interconnection" and "facilities" and stating that "interconnections . . . clearly are not "facilities, as that would make the term, 'Interconnection Facilities', as used in the standardized agreements a redundancy." Id. (Pet. App. A-10) The Court's logic jumps from the limited observation that the two words appear to have different meanings in the verbiage in which a FERC decision is couched to the flawed conclusion that "interconnections appear to be relationships between parties with respect to electricity flowing over facilities." Id. The logic chain between the initial statements and the Court's conclusions are difficult

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under *Order No. 2003* says: "The Interconnection Facilities Study shall specify and estimate the cost of the *equipment, engineering, procurement and construction work needed to*...physically and electrically connect the Interconnection Facility [distribution facility]...". (emphasis added).

to discern. The D.C. Circuit's rationale reflects a fundamental misunderstanding of the nature of interconnections. An interconnection is not a "relationship" between the owner of a generating facility and the owner of the distribution system. An interconnection *necessarily* involves a *physical* connection that permits electricity to be delivered from a generating facility to the distribution wires that ultimately deliver electricity to end-use customers. An "Interconnection Agreement" defines the relationship under which *"interconnection facilities" are constructed* and the "interconnection" is accomplished. Id. (Pet. App. A-10) The term "Interconnection Facilities" refers to the *facilities necessary to accomplish the physical connection* between the generator and the distribution system.[29] Id. There is no hint of a "sale" or any other sort of financial arrangement when generation and distribution facilities are "interconnected." Rather, there is the pouring of concrete, the erection of structures, the installation of equipment and the stringing of wires. None of these activities has the remotest relationship to the FERC's limited jurisdiction over "wholesale sales" accomplished using such facilities. In any event, an interconnection certainly does *not* guarantee that any FERC-jurisdictional sale will ever take place after the interconnection is built.[30] It is an

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29 The "Interconnection Facilities" at issue are the distribution and generation facilities that Congress has mandated be *excluded* from federal jurisdiction.

30 The FERC Order does not require a contract for the sale of the generating facility's output at the time of interconnection.

impermissible distortion of unambiguous statutory text to read the FERC's limited federal authority over non-physical "services" and "transactions" to allow federal regulation of physical interconnections.

While the lower court concedes that the FERC Order *does* regulate facets of the engineering and construction of distribution facilities, it claims that these provisions are tethered to the Commission's authority over interstate transmissions and wholesale sales: "[I]t is hard to see how the Federal Power Act could leave FERC weaponless against conduct that might encourage the running up of unreasonable costs." *NARUC v. FERC*, 425 F. 3rd 1280 (Pet. App. A-11) From this, the Court concludes the Commission's "authority to disallow recovery of costs imprudently incurred by jurisdictional firms may . . . impinge as a practical matter on the behavior of non-jurisdictional ones," and finds this impingement does not exceed permissible limits. Id.

This aspect of the opinion below goes off on a tangent focusing on the FERC's authority to disallow unreasonably incurred costs. This observation is simply irrelevant (and unfounded). There is no factual basis for the lower court's expression of concern over unreasonable costs associated with State-jurisdictional facilities. The States are every bit as concerned about, and attentive to, unreasonably or imprudently incurred costs as is the FERC. Moreover, the States are in as strong a position to disallow recovery of such costs as the FERC.

The intention to sell power at wholesale some time in the future does not provide the FERC with jurisdiction over the physical interconnection to the facility itself. Only after interconnection facilities are constructed can there be a sale of electricity that invokes the FERC's wholesale sales jurisdiction. If the D.C. Circuit decision stands, the FERC will effectively have been allowed to expand its jurisdiction over "wholesale sales" transactions to include requests for, and the construction of, local distribution facilities.

From any perspective, the D.C. Circuit's conclusion, which lies at the heart of its rationale for upholding the FERC's jurisdictional overreach, is hopelessly flawed. It is clear from any reasonable examination of what the FERC has required that State-jurisdictional facilities will be physically impacted and altered as a result.

III. THE D.C. CIRCUIT'S DECISION UPHOLDING THE FERC ORDER'S EXTENSION OF FEDERAL JURISDICTION OVER CERTAIN FACILITIES "SUBJECT TO AN OPEN ACCESS TRANSMISSION TARIFF (OATT)" RESULTS IN ARBITRARY AND CAPRICIOUS ACTION.

While the D.C. Circuit recognized the potential for uncertainty prompted by the difficulty of determining which distribution facilities are covered by an Open Access Transmission Tariff

("OATT") and which are not,[31] it dismisses the problem by merely stating that it sees no grounds for upsetting the FERC's judgment on this issue. *NARUC v. FERC,* 475 F. 3d at 1282. (Pet. App. A-15) The FERC's failure to address and to solve this problem is the essence of arbitrary and capricious agency action.

The FERC concedes that *there is no simple method of deciding what facilities are subject to an OATT.*

The FERC acknowledges that a transmission owner's rate filings may not allow an interconnection customer to determine whether a line it seeks to connect to is "subject to an OATT".[32]

Unfortunately, the FERC proposed a solution

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[31] Even though it may not be possible to identify whether or not a particular facility is actually subject to an OATT, the FERC Order applies to certain State-jurisdictional local distribution facilities.

[32] To determine if a given distribution line is covered by an OATT, the logical path is to examine the transmission owner's uniform system of accounts. However, this approach is unlikely to work in the majority of circumstances because these accounts may not clearly indicate whether a given distribution line is covered by that OATT. Typically, OATTs that include distribution facilities do not specifically identify which facilities and which points of interconnection are covered by the OATT. Even in cases where distribution facilities are known to be included in an OATT, it is difficult or impossible to identify whether specific distribution lines are covered by an OATT. Thus, there is no readily discernable way for all parties to clearly determine when a specific distribution line is covered by an OATT.

that is neither feasible, practical nor certain.[33] The FERC's acceptance of a facially inadequate *solution* to a key problem in the context of a real-world application constitutes the *essence* of arbitrary and capricious agency action. This fundamental flaw completely undermines the stated rationale for the FERC Order.[34] The D.C. Circuit's decision sets a highly undesirable judicial precedent in allowing such arbitrary and capricious agency action to stand.

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[33] The Commission is in no better position than the parties to a particular interconnection to make this determination. Indeed, FERC admits there will be cases that will produce controversy about whether a facility is under an OATT. *Order No. 2003-A* at 712. The Commission concludes that the *only reasonable method* for identifying which facilities are subject to a Transmission Provider's OATT is to rely on the Transmission Provider to make this information available to the Interconnection Customer during the Scoping Meeting or earlier. *Id.* If the Interconnection Customer disagrees with the Transmission Provider's conclusion that the facility in question is or is not subject to the Transmission Provider's OATT, the Customer must bring the issue to the attention of the Commission to obtain a definitive ruling.

[34] Far from streamlining access to new generation providers, The FERC Order creates new roadblocks to the very goal it seeks to accomplish - facilitation of interconnections by virtue of its failure to address issues like this one.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDICES CONTENTS

APPENDIX A.....A1

United States Court of Appeals for the District of Columbia Circuit Decision: *National Association of Regulatory Utility Commissioners, et al., v. Federal Energy Regulatory Commission*, 475 F.3d 1277 (D.C. Cir. January 12, 2007) ("*NARUC v. FERC*"). A copy of the United States Court of Appeals' decision is appended as APPENDIX A

APPENDIX B.....A32

Relevant Excerpts from the FERC's *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 F.E.R.C. ¶61,103 (2003); Order No. 2003-A, 106 F.E.R.C. ¶61,220 (2004); and Order No. 2003-C, 111 F.E.R.C. ¶61,401 (2005). [35]

APPENDIX C.....A37

The United States Court of Appeals for the District of Columbia Circuit denied the Petitioners' Petition for Rehearing En Banc and entered judgment on June 20, 2007. A copy of Order is appended as APPENDIX C.

APPENDIX D..... ....A39

This case involves Sections 814, 824, 824a-4, 824p,

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[35] Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005) is not included in APPENDIX D.

831c of the Federal Power Act, 16 U.S.C. §§ 791-839. APPENDIX D contains the text of these Sections.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit Decision: *National Association of Regulatory Utility Commissioners, et al., v. Federal Energy Regulatory Commission*, 475 F.3d 1277 (D.C. Cir. January 12, 2007) ("*NARUC v. FERC*"). A copy of the United States Court of Appeals' decision is appended as APPENDIX A.

United States Court of Appeals, District of Columbia Circuit.
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, et al., Petitioners
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent
Tenaska, Inc., et al., Intervenors.
Nos. 04-1148, 04-1149, 04-1152, 05-1050, 05-1292.

Argued Oct. 13, 2006.
Decided Jan. 12, 2007.
Rehearing En Banc Denied June 20, 2007.

Background: Federal Energy Regulatory Commission (FERC) issued orders requiring all transmission facilities to adopt standard agreement for interconnecting with generators larger than 20 megawatts. State regulatory agencies and utilities petitioned for review.

Holdings: The Court of Appeals, Williams, Senior Circuit Judge, held that:

(1) orders issued by FERC were valid exercise of its jurisdiction under FPA;
(2) orders did not impermissibly commandeer states' eminent domain authority;
(3) purported loss of transmission providers' "good will" did not result in taking;
(4) orders did not violate basic "cost causation" principle; and
(5) factual premises that underlay cost assignment practice of FERC were not drawn into question by unsupported generalizations in affidavit submitted in comment on proposed orders.

Orders upheld.

Sentelle, Circuit Judge, filed opinion dissenting in part.
West Headnotes
[1] Statutes 361 ⚿219(6.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(6.1) k. In General. Most Cited Cases
Chevron deference applies to interpretations of the jurisdictional provisions of the Federal Power Act (FPA) by the Federal Energy Regulatory Commission (FERC).

[2] Electricity 145 ⚿9(1)

145 Electricity
145k9 Transmission Facilities
145k9(1) k. In General; Easements. Most Cited Cases
Orders issued by Federal Energy Regulatory Commission (FERC), requiring all electrical transmission facilities to adopt standard agreement for interconnecting with generators larger than 20 megawatts, were valid exercise of its jurisdiction under FPA; orders were not impermissible exercise of jurisdiction over facilities because FERC had authority to regulate jurisdictional transactions, such as interstate transmissions and wholesale sales, occurring over non-jurisdictional facilities. Federal Power Act, § 201(b)(1), 16 U.S.C.A. § 824(b)(1).

[3] Electricity 145 ⚿9(1)

145 Electricity
145k9 Transmission Facilities
145k9(1) k. In General; Easements. Most Cited Cases
Seven-factor test, used to determine whether facility was exempt local distribution facility or covered transmission facility, did not apply to exercise of jurisdiction by Federal Energy Regulatory Commission (FERC) over electrical transactions, based on transactions' satisfaction of jurisdictional criteria of FPA, since decision as to whether facility should have been classified as jurisdictional had not been implicated. Federal Power Act, § 201(b)(1), 16 U.S.C.A. § 824(b)(1).

[4] Eminent Domain 148 ⚿4

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k4 k. Power of State in General. Most Cited Cases
Order issued by Federal Energy Regulatory Commission (FERC), which conditionally compelled electrical utilities to broaden their use of state-provided eminent domain authority for benefit of independents or drop use for its own and its affiliates' power, did not impermissibly commandeer states' eminent domain authority, since orders left state law completely undisturbed and only bound utilities, not state officials; continued state retention of license, or public utilities' continued employment of eminent domain, were not compelled by orders. U.S.C.A. Const.Amend. 5.

[5] Eminent Domain 148 ⚿2.12

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.12 k. Electricity; Power Lines. Most Cited Cases
Purported loss of electrical transmission providers' "good will" in their relation to landowners, by exercise of eminent domain power on behalf of independent generators, as required by anti-discrimination rules imposed upon providers by Federal Energy Regulatory Commission (FERC), did not result in Fifth Amendment taking, since injury to such good will was not any more severe than that inflicted by use of eminent domain for interconnection to affiliated generators and any use

of eminent domain by transmission providers had to be at expense of benefiting generator. U.S.C.A. Const.Amend. 5.

[6] Electricity 145 ⚿9(1)

145 Electricity
145k9 Transmission Facilities
145k9(1) k. In General; Easements. Most Cited Cases
Orders issued by Federal Energy Regulatory Commission (FERC), that required assignment of costs of facilities located at or beyond point of interconnection to transmission owner, did not violate basic "cost causation" principle, under which costs were to be allocated to those who caused costs to be incurred and reaped resulting benefits. Federal Power Act, § 212, 16 U.S.C.A. § 824k.

[7] Electricity 145 ⚿1

145 Electricity
145k1 k. Regulation in General; Statutes and Ordinances. Most Cited Cases
On a petition for review of an order of the Federal Energy Regulatory Commission (FERC), the Court of Appeals defers to the agency's reasonable application of its own precedents and upholds factual conclusions supported by substantial evidence.

[8] Administrative Law and Procedure 15A ⚿392.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(C) Rules and Regulations
15Ak392 Proceedings for Adoption
15Ak392.1 k. In General. Most Cited Cases
The doctrine obliging agencies to address significant comments leaves them free to ignore insignificant ones.

[9] Electricity 145 ⚿9(1)

145 Electricity
145k9 Transmission Facilities
145k9(1) k. In General; Easements. Most Cited Cases
Factual premises that underlay cost assignment practice of Federal Energy Regulatory Commission (FERC) were not drawn into question by unsupported generalizations in affidavit submitted by administrator for electrical utility in comment on proposed orders regarding transmission facilities, and thus FERC was not required to respond to such comment.

*1278 On Petitions for Review of Orders of the Federal Energy Regulatory Commission.

Laurence G. Chaset argued the cause for Governmental Petitioners. With him on the briefs were James Bradford Ramsay, Thomas D. Samford, IV, Arocles Aguilar, Aubrey Williams Turner, Jr., Gisele Lunsford Rankin, Florence P. Belser, and Robert D. Cedarbaum.
Andrew W. Tunnell argued the cause for Utility Petitioners. With him on the brief were S. Chris Still, Kevin A. McNamee, Neil H. Butterklee, John

D. McGrane, Heath K. Knakmuhs, and Antoine P. Cobb.
Lona T. Perry, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were Robert H. Solomon, Solicitor, and Samuel Soopper, Attorney.
Ashley C. Parrish argued the cause for intervenors Tenaska, Inc., et al. With him on the briefs were Neil L. Levy, Jennifer L. Key, Glen L. Ortman, Harvey L. Reiter, and Jonathan D. Schneider.
Gregory O. Olaniran entered an appearance.

Before: SENTELLE, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.

***1279** Opinion for the Court filed by Senior Circuit Judge WILLIAMS.
Opinion dissenting in part filed by Circuit Judge SENTELLE.WILLIAMS, Senior Circuit Judge.
In 1996 the Federal Energy Regulatory Commission issued Order No. 888 in the hopes of fostering competition in the electric generating industry. Such competition clearly depended on generators' having adequate means of getting their power to market. FERC's solution in Order No. 888 was to require transmission providers, which typically have a natural monopoly, to give generators equal access to transmission facilities. The Commission implemented the requirement in part by mandating the filing of suitable tariffs. See *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 682-83 (D.C.Cir.2000) ("*TAPS* "). We affirmed Order No. 888 in *TAPS*.

In the period directly after issuing Order No. 888,

FERC had monitored one element of the process-the interconnection agreements between operators of generators and transmission facilities-on a case-by-case basis. Finding that approach "inadequate" and "inefficient," FERC issued Order No.2003 and three successive rehearing orders. *Standardization of Generator Interconnection Agreements and Procedures*, Order No.2003, 104 F.E.R.C. ¶ 61,103 at 30,430 P 10 (2003), *order on reh'g*, Order No.2003-A, 106 F.E.R.C. ¶ 61,220 (2004), *order on reh'g*, Order No.2003-B, 109 F.E.R.C. ¶ 61,287 (2004), *order on reh'g*, Order No.2003-C, 111 F.E.R.C. ¶ 61,401 (2005). In the interests of achieving transparency and preventing transmission facility owners from favoring affiliated generators over independents in interconnection, the orders require all transmission facilities to adopt a standard agreement for interconnecting with generators larger than 20 megawatts.

Here we review claims advanced by two sets of petitioners (the two sets are generally aligned with each other in their positions): four utilities ("Utility Petitioners") and six state regulatory agencies (together with an association of such agencies, the National Association of Regulatory Utility Commissioners) ("Governmental Petitioners"). They challenge Order No.2003 and its sequels on the grounds that FERC exceeded its jurisdiction, unlawfully commandeered states, departed from its own precedent without explanation, and made policy decisions that are arbitrary and capricious. We reject all of these claims and affirm the orders.

* * * * * *

[1] Petitioners raise a succession of claims that FERC's orders usurp jurisdiction not provided by Congress. FERC's interpretations of the jurisdictional provisions of the Federal Power Act (the "Act") enjoy *Chevron* deference. *Detroit Edison Co. v. FERC*, 334 F.3d 48, 53 (D.C.Cir.2003) (citing *TAPS*, 225 F.3d at 694).

[2] Section 201(b)(1) of the Act makes the statute applicable to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce" and gives FERC jurisdiction not only over such transmission and sales but also over "all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b)(1). At the same time the Act precludes FERC "jurisdiction ... over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." *Id.* Order No.2003 asserts jurisdiction over the terms of interconnection between generators and transmission providers, even where the transmission facility also engages in local distribution, but only insofar as the interconnections*1280 are "for the purpose of making sales of electric energy for resale in interstate commerce." Order No.2003 at 30,545-46 P 804. Utility Petitioners claim that this represents an unlawful exercise of jurisdiction over dual-use facilities-ones that engage in both transmission and local distribution.

Petitioners believe that our opinion in *Detroit Edison* controls. There we rejected FERC's attempt to assert jurisdiction over unbundled retail service,

although such service involved neither jurisdictional sales nor jurisdictional transmission. Sales under FERC-jurisdictional tariffs would have enabled the shipper to escape stranded cost charges imposed under state-approved tariffs. 334 F.3d at 52. FERC's purported jurisdictional hook was that the power was being shipped over dual-use facilities that provided both retail and wholesale distribution services. *Id.* at 52, 54. We were unconvinced by this theory for asserting jurisdiction over non-jurisdictional transactions.

Here the issue is the inverse of *Detroit Edison;* Order No.2003 applies to jurisdictional transactions only. FERC determined that the provisions of Order No.2003 should apply "to interconnections to the facilities of a public utility's Transmission System that, at the time the interconnection is requested, may be used either to transmit electric energy in interstate commerce or to sell electric energy at wholesale in interstate commerce." Order No.2003-C at 31,656 P 51. "Interconnections," though seemingly not defined explicitly in the orders, clearly are not "facilities," as that would make the term "Interconnection Facilities," as used in the standardized agreements, a redundancy. See, e.g., Order No. 2003 at 30,577. In fact interconnections appear to be relationships between parties with respect to electricity flowing over facilities, and the orders here by their terms control the agreements governing those relationships. See, e.g., "Standard Large Generator Interconnection Agreement (LGIA)," *id.* at 30,616-67. By establishing standard agreements FERC has exercised its jurisdiction over the *terms* of those

relationships. Cf. *TAPS*, 225 F.3d at 696 ("FPA § 201 makes clear that *all aspects* of wholesale sales are subject to federal regulation, regardless of the facilities used." (emphasis added)).

In their reply briefs petitioners note that the orders regulate certain facets of the engineering and construction of facilities needed for the relevant transmissions. Utility Petitioners' Reply Br. at 4; Governmental Petitioners' Reply Br. at 5-6 & n. 9. But petitioners identify no specific aspect of the regulations that they claim is untethered to the Commission's authority over interstate transmissions and wholesale sales. As FERC's authority generally rests on the public interest in constraining exercises of market power, see *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1003 (D.C.Cir.1987), whether in the utility's rates or other service terms, and as a common test for the lawfulness of rates is their connection to the reasonably-incurred costs of providing the regulated service, *National Fuel Gas Supply Corp. v. FERC*, 900 F.2d 340 (D.C.Cir.1990), it is hard to see how the statute could leave FERC weaponless against conduct that might encourage or cloak the running up of unreasonable costs. The Commission's indisputable authority to disallow recovery of costs imprudently incurred by jurisdictional firms may, of course, impinge as a practical matter on the behavior of non-jurisdictional ones. So far as appears, petitioners in this facial attack have identified no impingement that exceeds what may be encompassed in such conventional exercises of jurisdiction.

*1281 Utility Petitioners also dispute FERC's assertion of jurisdiction over facilities jointly owned by private firms and states. This presents questions analogous to those raised by the transmission-and-distribution facilities just discussed, though here the divide is between private and public ownership rather than between transmission and distribution. Section 201(f) of the Act provides that "[n]o provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State." 16 U.S.C. § 824(f). (They are brought back in with respect to particular sections not relevant here. See § 3(22) of the Act, 16 U.S.C. § 796(22); § § 210-213, 16 U.S.C. § § 824i-824l; *Bonneville Power Administration v. FERC*, 422 F.3d 908, 916 (9th Cir.2005).) Therefore, according to petitioners, FERC may not regulate jointly-owned facilities. Although Order No.2003 explicitly states that it applies only "to Interconnection Service provided by the public utility on its portion of a jointly owned facility," Order No.2003 at 30,546 P 807, petitioners claim that FERC's purported distinction is not possible. In their view, an interconnection affects an entire facility, not simply the public utility's portion, and FERC's purported exercise of authority over the service therefore violates § 201(f). The argument fails for reasons similar to those discussed in the context of FERC's authority to regulate jurisdictional transactions occurring over non-jurisdictional facilities.

Any proper construction of § 201 must give effect to both FERC's jurisdiction over certain transactions occurring over public utilities and to § 201(f)'s

exclusion of state facilities. As FERC notes in its brief, jurisdictional utilities should not be able, without linguistic support from Congress, to escape regulation "simply by partnering with non-jurisdictional utilities." Respondent's Br. at 32. FERC navigated a similar problem in Order No. 888, which required equal access to transmission services. There the Commission stated clearly that it had authority to regulate a public utility, notwithstanding incidental effects on nonjurisdictional entities:

The fact that a public utility may jointly own, with a non-jurisdictional entity, transmission facilities through which it engages in sales for resale and/or transmission of electric energy in interstate commerce does not alter the Commission's authority to regulate that public utility.... The fact that ... an order may affect a non-jurisdictional joint owner does not undermine the validity of the Commission's order.

Order No. 888-A, FERC Stats. & Regs. ¶ 61,182 at 30,219, 62 Fed.Reg. 12,274, 12,300/2 (Mar. 4, 1997). FERC relied on the same logic in Order No.2003. See Order No.2003 at 30,546 P 807. Utility Petitioners accept the validity of Order No. 888 as well as other cases that they view as distinguishable from the present situation. See, e.g., *Mid-Continent Area Power Pool*, 89 F.E.R.C. ¶ 61,135 at 61,387-88 (1999); *Bonneville Power*, 422 F.3d at 925.

According to petitioners, however, Order No. 888 affected the non-jurisdictional entities only in the sense of invalidating contractual provisions between jurisdictional and non-jurisdictional co-owners,

whereas Order No.2003 "addresses the request for and construction of facilities ... by a non-jurisdictional co-owner." Utility Petitioners' Reply Br. at 5-6. The supposed distinction is of no account, however. As discussed above, assertion of jurisdiction over specified transactions, even though affecting the conduct of the owner(s) with respect to its facilities, is not per se an exercise of jurisdiction over the facility. The contract modifications mandated in Order No. 888, forcing the non-jurisdictional owner to permit certain transactions ***1282** to occur over the jointly owned facility, obviously affected that owner's ownership rights in, and conduct with respect to, the facility; the modifications removed a hitherto valid veto power over the use in question. To the extent that Order No.2003 conditions a jurisdictional utility's participation in the transmission and interconnection markets on that utility's securing physical changes in the facilities, and those changes bear a close enough relation to FERC's exercise of jurisdiction over jurisdictional transactions (petitioners pose no challenge to the adequacy of that relation), the Order effects no legally material extension of the authority exercised in Order No. 888.

The Governmental Petitioners challenge FERC's articulation of its assertion of jurisdiction over interconnections with dual-use facilities (ones for transmission and local distribution)-namely, FERC's claim of authority where such facilities are "used to transmit electric energy in interstate commerce on behalf of a wholesale purchaser pursuant to a Commission-filed OATT [Open Access Transmission

Tariff]." Order No.2003 at 30,545-46 P 804. See also Order No.2003-A at 31,071-72 P 710. Governmental Petitioners claim that this involves jurisdictional "boot-strapping." They cite our opinion in *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C.Cir.2005), where FERC had asserted jurisdiction based solely on a voluntarily filed tariff "even if FERC would not otherwise have jurisdiction." *Id.* at 461. Here we have the exact opposite of boot-strapping. FERC is exercising jurisdiction only over "interconnections to a 'distribution' facility when the facility is included in a public utility's Commission-filed OATT *and* the interconnection is for the purpose of facilitating a jurisdictional wholesale sale of electric energy." Order No.2003-A at 31,075 P 730 (emphasis added).

Governmental Petitioners also object that FERC's approach creates uncertainty by making jurisdiction turn on (among other things) whether the facility is covered by an OATT. FERC acknowledged the potentiality for uncertainty, but reasoned that most cases would present no controversy and that, if a dispute should arise, it would depend in the first instance on the transmission provider to make the relevant information available to potential interconnecting customers. Order No.2003-A at 31,072 P 712. On the record before us, we see no grounds for upsetting the Commission's judgment.

[3] Closely related to the jurisdictional claims is the Governmental Petitioners' assertion that FERC erred by not applying its seven-factor test, which we approved in *TAPS*, 225 F.3d at 696, to determine whether a facility is an exempt local distribution facility or a covered transmission facility. But here,

as often mentioned above, at least with regard to the exercises of power disputed before us, FERC is exerting jurisdiction over transactions, based on the transactions' satisfaction of the Act's jurisdictional criteria. It thus has had no occasion to decide whether a facility as such should be classified as jurisdictional or not.

* * * * * *

[4] In its proposal leading to Order No.2003 FERC had contemplated requiring transmission providers to use reasonable efforts, including available "eminent domain authority, if necessary, to facilitate the interconnection" of generators. See Order No.2003 at 30,483 P 384. Responding to comments suggesting that the requirement would unduly burden transmission firms, *id.* at 30,484 P 391, FERC reduced this to a provision forbidding such firms from discriminating in the exercise of eminent domain powers to the detriment*1283 of independent generators and to the advantage of affiliates. See, e.g., Order No.2003-A at 31,003 P 298. Utility Petitioners object that these provisions of Order No.2003 and its sequels impermissibly "commandeer" states' eminent domain authority, contrary to the Supreme Court's holdings in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Whether FERC has commandeered states is a question of law that we review de novo.

The orders here are a far cry from what the Supreme Court found objectionable in *New York* and *Printz*.

In *New York,* the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments of 1985 that gave states a Hobson's choice: either take title to low-level radioactive waste generated by third parties or regulate the waste pursuant to Congress's direction. Congress didn't have authority to impose either option on states directly and thus could not force states to choose one or the other. The Court emphasized that Congress may not "commandeer" states by compelling them either to create or administer a federal regulatory scheme. 505 U.S. at 174-77, 112 S.Ct. 2408. In *Printz* the Court found that *New York* 's anti-commandeering principle precluded a provision of the Brady Handgun Violence Prevention Act requiring local law enforcement officers to help conduct background checks on individuals seeking to purchase a firearm. 521 U.S. at 933, 117 S.Ct. 2365.

We recognize that a state's authority to exercise the eminent domain power, and to license public utilities to do so, is an important state power. But FERC has done nothing more than impose a non-discrimination provision on public utilities. The orders explicitly leave state law untouched, specifying that any exercise of eminent domain by a public utility pursuant to the orders' non-discrimination mandate be "consistent with state law." Order No.2003-A at 31,144, LGIA § 5.13; see also *id.* at 31,004 P 300. Thus the states remain completely free to continue licensing public utilities to exercise eminent domain, or to discontinue that practice. To be sure, if hitherto a utility would not have exercised eminent domain to enable interconnection with an independent generator, the

orders, conditionally, compel the utility either to broaden its use of the state-provided authority for the benefit of independents, or to drop the use for its own and its affiliates' power. But the modifier *conditionally* is critical. Nothing in the federal rule compels either continued state retention of the license, or public utilities' continued employment of eminent domain. The intrusion on state power is surely no greater than (many would say dramatically less than) that of a federal command that, if a state hires employees for the performance of traditional governmental functions, it must pay them no less than a federally determined wage. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Moreover, we believe that our dissenting colleague's focus on the "plain statement" requirement that applies to purported federal creation of state obligations is misplaced; the orders here leave state law completely undisturbed and bind only utilities-not state officials.

[5] Related to Utility Petitioners' "commandeering" claim is their assertion that Order No.2003-A involves an unlawful taking. They concede, as they must, that the Order explicitly requires that any uses of eminent domain by transmission providers be at the expense of the benefiting generator. Order No.2003-A at 31,003 P 298. But the Utility Petitioners claim that exercising eminent domain power on behalf*1284 of independent generators could undermine transmission providers' "good will" in their relation to landowners. Assuming that that is so, we note that petitioners make no claim that the injury to such good will is any more severe than

the one inflicted by uses of eminent domain for interconnection to affiliated generators. Anti-discrimination rules commonly require the incurrence of costs by the obligated parties; their very imposition presupposes that some such parties would, in pursuit of their self-interest, violate the anti-discrimination norm. We cannot see that the potential loss of good will rises above the sort of costs commonly inflicted by such mandates.

* * * * * *

[6] The remaining significant challenge, brought by both sets of petitioners, is to the so-called "At or Beyond" rule. The rule is intended to guide assignment of costs as between a transmission facility and an interconnecting generator. Under the rule, "the Interconnection Customer [is] solely responsible for the costs of Interconnection Facilities, which are defined as all facilities and equipment between the Generating Facility and the Point of Interconnection with the Transmission System. Network Upgrades, which are defined as all facilities and equipment constructed *at or beyond* the Point of Interconnection for the purpose of accommodating the new Generating Facility," are (ultimately) the responsibility of the "Transmission Provider." Order No.2003 at 30,518-19 P 676 (emphasis added).

[7] Petitioners claim that the "At or Beyond" rule departs from the Commission's own precedents, is based on factual conclusions unsupported by substantial evidence, and is otherwise arbitrary or capricious. In our review we defer to an agency's

reasonable application of its own precedents and uphold factual conclusions supported by substantial evidence. See *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335, 1341 (D.C.Cir.2004). We reject all of these assertions.

In their claim of departure from precedent, petitioners point to our decision in *Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C.Cir.2004). There we considered whether FERC's use of the "At or Beyond" rule in the decision under review represented a departure from an earlier FERC decision, *Consumers Energy Co.*, 95 F.E.R.C. ¶ 61,233 (2001), in which FERC had used a "From" test to differentiate between Network Upgrades and Interconnection Facilities, assigning the transmission provider only the costs for "facilities *from* the point where the generator connects to the grid," *id.* at 61,804 (emphasis added). In *Entergy* we explicitly observed that the two tests might be fully consistent, see *Entergy*, 391 F.3d at 1249, 1251, but we thought that the difference in language was potentially significant and that FERC had failed to adequately explain its precedents, see *id.* at 1251.

In its order on remand from *Entergy*, *Nevada Power Co.*, 113 F.E.R.C. ¶ 61,007 (2005), the Commission explained both the relation between the two labels and prior anomalies in its rulings. In essence, it said that "From" was a vague term and that "At or Beyond" was simply "clearer terminology" that offered "a more precise way" of explaining FERC precedent. *Id.* at 61,013 P 12. And, acknowledging some past anomalies (principally in *Consumers Energy*), in which it had assigned to the

interconnecting generator the cost of some facilities at the actual point of interconnection, it explained that "the issue was not raised, and the Commission did not discuss it or rule on it." *Id.* at 61,013 P 13; see also *id.* at 61,014 PP 14-15. We note that ***1285** since then the Commission has continued to adhere to the "At or Beyond" approach. See *Duke Energy Hinds, LLC*, 117 F.E.R.C. ¶ 61,210 at *5 P 23 (2006). In short, the "At or Beyond" rule can no longer be considered an unexplained departure from FERC precedent.

Petitioners also contend that the "At or Beyond" rule violates the basic "cost causation" principle, under which costs are to be allocated to those who cause the costs to be incurred and reap the resulting benefits. But FERC has long taken the view that customer "but-for" causation isn't dispositive of this issue. "[E]ven if a customer can be said to have caused the addition of a grid facility, the addition represents a *system* expansion used by and benefitting *all* users due to the integrated nature of the grid." *Public Service Co. of Colorado*, 62 F.E.R.C. ¶ 61,013 at 61,061 (1993). (Indeed, for purposes of marginal cost pricing, all customers cause the incurrence of the costs associated with coincident peak load, whether by adding or merely continuing their usage. *Town of Norwood, Mass. v. FERC*, 962 F.2d 20, 24 n. 1 (D.C.Cir.1992).) We have endorsed the approach of "assign[ing] the costs of system-wide benefits to all customers on an integrated transmission grid." *Western Massachusetts Electric Co. v. FERC*, 165 F.3d 922, 927 (D.C.Cir.1999).

[8][9] Utility Petitioners take issue, however, with

the empirical conclusion that Network Upgrades benefit the entire network. They point to an affidavit by James E. Howell, Jr., an administrator with Southern Company Services, who claimed that the addition of unnecessary new facilities causes interruptions with power lines and decreases the network's reliability. Utility Petitioners object that because FERC did not address the Howell Affidavit directly, the Commission's factual conclusions are unsupported by substantial evidence. The doctrine obliging agencies to address significant comments leaves them free to ignore insignificant ones. See *Troy Corp. v. Browner*, 120 F.3d 277, 289 (D.C.Cir.1997). The evidence to which the petitioners point is one conclusory paragraph that offers no specific basis for undermining the Commission's long-held understanding that Network Upgrades provide system-wide benefits. FERC said as much in Order No.2003-B, referring to the contents of the Howell Affidavit as "unsupported hypothetical generalizations." Order No.2003-B at 31,292 P 56. Though the modifier "hypothetical" is inaccurate (the paragraph asserts flat out, for example, that "installation of a new substation ... results in the affected transmission line being less reliable"), Howell's generalizations are indeed unsupported, and thus insufficient (on their own) to draw in question the factual premises underlying the Commission's cost assignment practice.

Both sets of petitioners argue that the "At or Beyond" rule is inconsistent with FERC's obligation to ensure efficient siting of facilities pursuant to § 212 of the Act, 16 U.S.C. § 824k, added by the Energy Policy Act of 1992. In pursuit of this claim

Governmental Petitioners misquote § 212(a) as saying that the rates and terms in question must "promote the economically *efficient siting* of transmission and generation of electricity." Governmental Petitioners' Br. at 35 (emphasis added). The word "siting" in fact appears nowhere in the relevant section. In reality the statute requires that rates "promote the economically efficient transmission and generation of electricity." 16 U.S.C. § 824k(a). No matter; FERC has understandably identified efficient siting as one of its goals in administering the statute. *1286 *Pricing Policy for Transmission Services; Policy Statement*, 59 Fed.Reg. 55,031, 55,035 (Oct. 26, 1994).

Petitioners' argument is essentially that assignment to the transmission owner of the costs of facilities located at or beyond the point of interconnection creates an improper incentive. This is in essence a variation on petitioners' argument that the "At or Beyond" rule violates cost causation principles. Recall that the rule sticks generator owners with the *entire* cost of the link between the generator and the transmission facility; that, presumably, is the cost most affected by siting choices. Siting also will affect the economic viability of the interconnection upgrades. Order 2003-B at 31,288 PP 32, 33. As to these, the orders require the generator to supply the upfront financing; more important, they call for a rate structure that imposes on the generator most or all of the risk of non-recovery. Order No.2003-A at 31,054 P 613. We see no substantial basis for petitioners' siting incentive theory.

* * * * * *

Petitioners' remaining objections concern the effectuation of the larger policies we've already discussed. These are questions of agency policy that we would overturn only if the Commission's decisions were arbitrary or capricious. 5 U.S.C. § 706(2)(A). Having carefully considered petitioners' arguments and FERC's explanations of its policies in the orders under review, we see no basis for any such finding. The issues do not merit discussion in a published opinion.

* * * * * *

For the foregoing reasons, we uphold Orders No.2003, 2003-A, 2003-B, and 2003-C against all objections raised by petitioners.

So ordered.

SENTELLE, Circuit Judge, dissenting in part.
I concur in most of the majority's opinion, but I cannot join that part of the opinion that upholds the eminent domain provisions of Order No.2003. *See* Maj. Op. 1282-83. FERC is a "creature of statute," and the agency has "*only* those authorities conferred upon it by Congress." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C.Cir.2004) (internal quotation marks omitted). "[A]n agency literally has no power to act ... unless and until Congress confers power upon it." *Id.* (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)). I do not believe that Congress has authorized FERC to regulate the use of state-granted eminent domain power, and

thus I respectfully dissent from that portion of the majority's opinion.

* * * * * *

Under FERC's new Standard Large Generator Interconnection Agreement, transmission providers are required to take certain steps to help generators obtain necessary land for interconnection facilities. Transmission providers "shall at Interconnection Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its Affiliates, including use of its eminent domain authority." Order No.2003-A, 69 Fed.Reg. 15,932, 15,953-54, 16,033 (2004). In other words, to the extent that transmission providers use eminent domain to interconnect with their own generation facilities, they must now use eminent domain on behalf of unaffiliated generators as well. The issue before us is whether FERC has statutory authority to regulate transmission providers' use of state-granted eminent domain power, and if FERC does have such authority whether the provisions of Order *1287 No.2003 that address eminent domain are constitutional.

Courts may not presume that Congress has intended to regulate the "substantial sovereign powers" of states unless the federal statute in question is unmistakably clear. The Supreme Court has held that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the

statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)) (internal quotation marks omitted). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461, 111 S.Ct. 2395. Courts have applied this clear statement rule in a variety of cases involving federal regulation of the "substantial sovereign powers" of the states. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002) (whether the federal supplemental jurisdiction statute tolls the statutes of limitation for state law claims in state court); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73-74, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (whether a federal statute abrogates state sovereign immunity); *Gregory*, 501 U.S. at 461-67, 111 S.Ct. 2395 (whether the federal Age Discrimination in Employment Act applies to state judges); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (whether states are "persons" that may be sued under 42 U.S.C. § 1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) (whether a federal statute preempts state law); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471-72 (D.C.Cir.2005) (whether a federal statute should be interpreted to regulate the practice of law, which has long been regulated at the state level).

I believe that eminent domain is easily classified as

a "substantial sovereign power" of the states, and thus the clear statement rule applies to federal regulation of this power. Courts have long recognized that eminent domain is at the very core of state sovereignty. As the Supreme Court has stated:

The power of eminent domain is an attribute of sovereignty, and inheres in every independent state.... The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will.

Georgia v. City of Chattanooga, 264 U.S. 472, 480, 44 S.Ct. 369, 68 L.Ed. 796 (1924). *See also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (noting that eminent domain "is traditionally associated with [state] sovereignty"). Courts have also emphasized that even if eminent domain authority has been delegated to a public utility or a privately-owned corporation, it is still the *state* that is acting whenever the eminent domain power is used:The right of eminent domain is an attribute of sovereignty. ... It is none the less a public right, because the state sometimes consents that it may be exercised by a quasi public corporation like a common carrier. Such license or permission is granted because its exertion in that form is thought to be for the public interest.... It permits them to ***1288** proceed in their own names, but really on behalf of the state ....

Louisville & N.R. Co. v. W. Union Tel. Co., 268 F. 4,

8 (6th Cir.1920). *See also* *Baldwin v. Appalachian Power Co.*, 556 F.2d 241 (4th Cir.1977) ("By exercising the delegated power of eminent domain, a public service corporation acts as an agent of the state ..."); *Louisiana v. Chambers Inv. Co.*, 595 So.2d 598, 601 (La.1992) ("[Eminent domain] always involves the taking or damaging of property interests by the state or some alter ego of the state, such as a public utility, that has been delegated the power to condemn."); *Wissler v. Yadkin River Power Co.*, 158 N.C. 465, 74 S.E. 460, 460 (1912) ("This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large."). Thus, eminent domain is properly categorized as a "substantial sovereign power" of the states, even when that power has been delegated to a public utility. Accordingly, we should not presume that Congress intended to regulate the use of state eminent domain authority unless the federal statute in question is "unmistakably clear."

Turning to the instant case, Order No.2003 will require transmission providers either to forego the use of their state-granted eminent domain power altogether, or to use this power to condemn property on behalf of unaffiliated generators. These provisions of Order No.2003 cannot possibly be lawful unless Congress has "unmistakably" authorized FERC to regulate the use of state-granted eminent domain power. FERC has not identified and I have not found any such clear statement of congressional intent in the relevant statutes. The federal statutes pertaining to the

"regulation and development of power" are codified in title 16 of the U.S.Code. *See* 16 U.S.C. § § 791-839. Noticeably absent from these sections of the Code is any provision granting FERC authority to dictate the manner in which state eminent domain power may be used.

Congress's treatment of eminent domain in other provisions of the energy statutes confirms that we should not infer from FERC's general grant of jurisdiction that the agency also has the power to regulate state eminent domain. When Congress addresses issues involving eminent domain, it tends to do so in a clear, detailed, and specific manner. *See* 16 U.S.C. § 824a-4(a) (granting the Secretary of Energy limited authority to use eminent domain to acquire rights-of-way "through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada"); *id.* § 824p(e) (granting eminent domain authority to certain licensees to build transmission facilities in "national interest electric transmission corridor[s]"); *id.* § 814 (granting eminent domain authority to certain licensees to acquire land "necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant thereto"); *id.* § 831c(h)-(i) (authorizing the TVA to use eminent domain to "acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River"). Although these provisions address federal eminent domain authority-rather than FERC's power to regulate state eminent domain-they nonetheless

show the specificity that Congress uses when it addresses eminent domain. These provisions reinforce my conclusion that FERC's jurisdiction over interstate transmission and wholesale sales of electric energy does not include *sub silentio* ***1289*** the authority to regulate state eminent domain.

* * * * * *

Under well-established principles of statutory interpretation, courts should not presume that Congress has intruded upon a core area of state sovereignty unless the relevant federal statute is clear and unambiguous. Here, FERC has not identified any federal statute that clearly authorizes the Commission to regulate the use of state eminent domain power. Thus, I would hold that the provisions of Order No.2003 that impose restrictions on transmission providers' use of state-granted eminent domain power are beyond the scope of FERC's statutory authority. Because I would resolve this issue on statutory grounds, I do not need to address the constitutional issue of "commandeering." Of course, in the future, Congress might pass a statute that specifically authorizes FERC to regulate how transmission providers use their eminent domain power. Such a statute may raise constitutional issues under *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), but those issues are not before us at this time.

For the aforementioned reasons, I respectfully

dissent from the portions of the majority opinion that address the eminent domain provisions of Order No.2003. I join the remainder of the majority's opinion.

APPENDIX B

Relevant Excerpts from the FERC's *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003); Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004); and Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005). [36]

8.2 Scope of Interconnection Facilities Study.

The Interconnection Facilities Study shall specify and estimate the cost of the equipment, engineering, procurement and construction work needed to implement the conclusions of the Interconnection System Impact Study in accordance with Good Utility Practice to physically and electrically connect the Interconnection Facility to the Transmission System. The Interconnection Facilities Study shall also identify the electrical switching configuration of the connection equipment, including, without limitation: the transformer, switchgear, meters, and other station equipment; the nature and estimated cost of any Transmission Provider's Interconnection Facilities and Network Upgrades necessary to accomplish the interconnection; and an estimate of the time required to complete the construction and installation of such facilities.

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[36] Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005) is not included in APPENDIX D.

[Section 8.2 of the Large Generator Interconnection Procedures (LGIP)][37]

Interconnection Facilities shall mean the Transmission Provider's Interconnection Facilities and the Interconnection Customer's Interconnection Facilities. Collectively, Interconnection Facilities include all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades. [Article 1 of the Large Generator Interconnection Agreement (LGIA)][38]

Paragraph 298 of Order No. 2003-A[39]

Since the Interconnection Customer is required to demonstrate site control when it first files its Interconnection Request, the Transmission Provider would not be asked to use its eminent domain

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[37] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003).

[38] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003).

[39] Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004).

authority to assist in siting the Generating Facility. However, to avoid confusion, we will delete the last sentence of LGIA Article 5.13 which could be read as requiring a Transmission Provider to obtain land on which the Interconnection Customer could site the Generating Facility.[40] To retain the Affiliate concept in the deleted text, we modify the first sentence of Article 5.12 to read: "* * * shall at Interconnection Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf, or on behalf of its Affiliates, including use of its eminent domain authority * * *." Additionally, the Scoping Meeting provisions within the LGIP already require the Transmission Provider to assist the Interconnection Customer in planning and siting issues. Since the Scoping Meeting is one of the first steps in the Interconnection Process, these issues should be resolved long before the LGIA is signed.

Paragraph 712 of Order No. 2003-A[41]:

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[40] The deleted sentence reads: "Upon receipt of a reasonable siting request, Transmission Provider shall provide siting assistance to the Interconnection Customer comparable to that provided to the Transmission Provider's own, or an Affiliate'sgeneration." [Reproducing footnote 68 in Order No. 2003-A].

[41] Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004).

In response to NARUC's request that there be a readily discernible method for determining which facilities are subject to an OATT, we note first that in most cases there will be no controversy about whether a facility is under the OATT. When there is, however, there is no simple method of deciding what facilities are under an OATT. Even if the Interconnection Customer consults the Transmission Provider's rate filings, it might be unable to determine whether a facility to which it seeks interconnection is subject to the OATT. We conclude that the only reasonable method for identifying which facilities are subject to a Transmission Provider's OATT is to rely on the Transmission Provider in the first instance to make this information available to the Interconnection Customer during the Scoping Meeting or earlier. If the Interconnection Customer disagrees with the Transmission Provider's conclusion that the facility in question lies within or outside the Transmission Provider's OATT, it should bring the issue to the attention of the Commission.

Paragraph 53 of Order No. 2003-C[42]:

When a "local distribution" facility is used to transmit energy sold at wholesale as well as energy sold at retail, we previously have called this a "dual use" facility because it is used both for sales subject to Commission jurisdiction and for sales subject to

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42 Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005).

state jurisdiction.[43] Under Order No. 2003, if such a facility is subject to wholesale open access under an OATT at the time the Interconnection Request is made, and the interconnection will connect a generator to a facility that would be used to facilitate a wholesale sale, Order No. 2003 applies and the interconnection must be subject to Commission-approved terms and conditions. Because the Commission's authority to regulate in this circumstance is limited to the wholesale transaction, we conclude that we do not have the authority to directly regulate the facility that is used to transmit the energy being sold at wholesale. In other words, while the Commission may regulate the entire transmission component (rates, terms and conditions) of the wholesale transaction – whether the facilities used to transmit are labeled "transmission" or "local distribution"– it may not regulate the "local distribution" facility itself, which remains statejurisdictional. We believe this properly respects the boundaries drawn in the FPA.

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[43] We note that the DTE court rejected DTE's attempt to use the dual use facility or dual function rationale. DTE Energy Co. v. FERC, 394 F.3d 954, 962-63 (D.C. Cir. 2005). The court, however, did not address "dual use" as it applies to the Commission's authority to regulate wholesale sales. Also, when a "dual use" facility is involved in a wholesale sale, we do not claim jurisdiction over the facility itself, just the wholesale sale transaction occurring over that facility. See Detroit Edison Co. v. FERC, 334 F.3d 48, 51 (D.C. Cir. 2003) (explaining that the Commission has jurisdiction "over all wholesale service," including wholesale transactions that occur over "local distribution" facilities). [Reproducing footnote 42 in Order No. 2003-C].

APPENDIX C

The United States Court of Appeals for the District of Columbia Circuit denied the Petitioners' Petition for Rehearing En Banc and entered judgment on June 20, 2007. A copy of Order is appended as APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1148 **September Term, 2006**
Filed On: June 20, 2007
[1048356]

National Association of Regulatory Utility Commissioners, et al.,
Petitioners

v.

Federal Energy Regulatory Commission,
Respondent

PacifiCorp, et al.,
Intervenors

Consolidated with 04-1149, 04-1152, 05-1050, 05-1292

BEFORE: Ginsburg, Chief Judge, and Sentelle,* Henderson,**Randolph, Rogers, Tatel,

Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Petitioners' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

* Circuit Judge Sentelle would grant the petition for rehearing en banc.
** Circuit Judge Henderson did not participate in this matter.

APPENDIX D

This case involves Sections 814, 824, 824a-4, 824p, 831c of the Federal Power Act, 16 U.S.C. §§ 791-839. APPENDIX D contains the text of these Sections.

§ 814. Exercise by licensee of power of eminent domain

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000 [FN1] *Provided further,* That no licensee may use the right of eminent domain under this section to acquire any lands or

other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after October 24, 1992, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.

[FN1] So in original. A colon should probably appear.

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale

of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of

applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined
The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f) [FN1], 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v).

(f) United States, State, political subdivision of a

State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of--

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C.A. § 16451 et seq.].

[FN1] There is no subsec. (f) in 824e.

§ 824a-4. Seasonal diversity electricity exchange

(a) Authority

The Secretary may acquire rights-of-way by purchase, including eminent domain, through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada if he determines--

(1) after opportunity for public hearing--

(A) that the exchange is in the public interest and would further the purposes referred to in section 2611(1) and (2) of this title and that the acquisition of such rights-of-way and the construction and operation of such transmission facilities for such purposes is otherwise in the public interest,

(B) that a permit has been issued in accordance with subsection (b) of this section for such construction, operation, maintenance, and connection of the facilities at the border for the transmission of electric energy between the United States and Canada as is necessary for such exchange of electric power, and

(C) that each affected State has approved the portion of the transmission route located in each State in accordance with applicable State law, or if there is no such applicable State law in such State, the Governor has approved such portion; and

(2) after consultation with the Secretary of the Interior and the heads of other affected Federal agencies, that the Secretary of the Interior and the heads of such, [FN1] other agencies concur in writing in the location of such portion of the

transmission facilities as crosses Federal land under the jurisdiction of such Secretary or such other Federal agency, as the case may be.

The Secretary shall provide to any State such cooperation and technical assistance as the State may request and as he determines appropriate in the selection of a transmission route. If the transmission route approved by any State does not appear to be feasible and in the public interest, the Secretary shall encourage such State to review such route and to develop a route that is feasible and in the public interest. Any exercise by the Secretary of the power of eminent domain under this section shall be in accordance with other applicable provisions of Federal law. The Secretary shall provide public notice of his intention to acquire any right-of-way before exercising such power of eminent domain with respect to such right-of-way.

(b) Permit

Notwithstanding any transfer of functions under the first sentence of section 301(b) of the Department of Energy Organization Act [42 U.S.C.A. § 7151(b)], no permit referred to in subsection (a) (1) (B) of this section may be issued unless the Commission has conducted hearings and made the findings required under section 202(e) of the Federal Power Act [16 U.S.C.A. § 824a(e)] and under the applicable execution order respecting the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country. Any finding of the Commission under an applicable executive order referred to in

this subsection shall be treated for purposes of judicial review as an order issued under section 202(e) of the Federal Power Act.

(c) Timely acquisition by other means

The Secretary may not acquire any rights-of-day [FN2] under this section unless he determines that the holder or holders of a permit referred to in subsection (a) (1) (B) of this section are unable to acquire such rights-of-way under State condemnation authority, or after reasonable opportunity for negotiation, without unreasonably delaying construction, taking into consideration the impact of such delay on completion of the facilities in a timely fashion.

(d) Payments by permittees

(1) The property interest acquired by the Secretary under this section (whether by eminent domain or other purchase) shall be transferred by the Secretary to the holder of a permit referred to in subsection (b) of this section if such holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs. The Secretary may accept, and expend, for purposes of such acquisition, amounts from any such person before acquiring a property interest to be transferred to such person under this section.

(2) If no payment is made by a permit holder under paragraph (1), within a reasonable time, the Secretary shall offer such rights-of-way to the original owner for reacquisition at the original price

paid by the Secretary. If such original owner refuses to reacquire such property after a reasonable period, the Secretary shall dispose of such property in accordance with applicable provisions of law governing disposal of property of the United States.

(e) Federal law governing Federal lands

This section shall not affect any Federal law governing Federal lands.

(f) Reports

The Secretary shall report annually to the Congress on the actions, if any, taken pursuant to this section.

[FN1] So in original. Comma should probably be deleted.

[FN2] So in original. Probably should be "rights-of-way".

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

(1) Not later than 1 year after August 8, 2005 and every 3 years thereafter, the Secretary of Energy (referred to in this section as the "Secretary"), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including

an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

(3) The Secretary shall conduct the study and issue the report in consultation with any appropriate regional entity referred to in section 824*o* of this title.

(4) In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

(B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and

(ii) a diversification of supply is warranted;

(C) the energy independence of the United States would be served by the designation;

(D) the designation would be in the interest of national energy policy; and

(E) the designation would enhance national defense and homeland security.

(b) Construction permit

Except as provided in subsection (i) of this section, the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) of this section if the Commission finds that--

(1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to--

(i) approve the siting of the facilities; or

(ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has--

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

(c) Permit applications

(1) Permit applications under subsection (b) of this section shall be made in writing to the Commission.

(2) The Commission shall issue rules specifying--

(A) the form of the application;

(B) the information to be contained in the application; and

(C) the manner of service of notice of the permit application on interested persons.

(d) Comments

In any proceeding before the Commission under subsection (b) of this section, the Commission shall afford each State in which a transmission facility covered by the permit is or will be located, each affected Federal agency and Indian tribe, private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit.

(e) Rights-of-way

(1) In the case of a permit under subsection (b) of this section for electric transmission facilities to be located on property other than property owned by the United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.

(2) Any right-of-way acquired under paragraph (1) shall be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition.

(3) The practice and procedure in any action or proceeding under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedure in a similar action or proceeding in the courts of the State in which the property is located.

(4) Nothing in this subsection shall be construed to authorize the use of eminent domain to acquire a right-of-way for any purpose other than the construction, modification, operation, or maintenance of electric transmission facilities and related facilities. The right-of-way cannot be used for any other purpose, and the right-of-way shall terminate upon the termination of the use for which the right-of-way was acquired.

(f) Compensation

(1) Any right-of-way acquired pursuant to subsection (e) of this section shall be considered a taking of private property for which just compensation is due.

(2) Just compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.

(g) State law

Nothing in this section precludes any person from constructing or modifying any transmission facility in accordance with State law.

(h) Coordination of Federal authorizations for

transmission facilities

(1) In this subsection:

(A) The term "Federal authorization" means any authorization required under Federal law in order to site a transmission facility.

(B) The term "Federal aut' orization" includes such permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law in order to site a transmission facility.

(2) The Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility.

(3) To the maximum extent practicable under applicable Federal law, the Secretary shall coordinate the Federal authorization and review process under this subsection with any Indian tribes, multistate entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the facility, to ensure timely and efficient review and permit decisions.

(4)(A) As head of the lead agency, the Secretary, in consultation with agencies responsible for Federal authorizations and, as appropriate, with Indian tribes, multi state entities, and State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorization and environmental reviews, shall establish prompt and binding intermediate

milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility.

(B) The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed

(i) within 1 year; or

(ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable.

(C) The Secretary shall provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved to have each such agency determine and communicate to the prospective applicant not later than 60 days after the prospective applicant submits a request for such information concerning

(i) the likelihood of approval for a potential facility; and

(ii) key issues of concern to the agencies and public.

(5)(A) As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.

(B) The Secretary and the heads of other agencies

shall streamline the review and permitting of transmission within corridors designated under section 503 of the Federal Land Policy and Management Act (43 U.S.C. 1763) by fully taking into account prior analyses and decisions relating to the corridors.

(C) The document shall include consideration by the relevant agencies of any applicable criteria or other matters as required under applicable law.

(6)(A) If any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established by the Secretary pursuant to this section for deciding whether to issue the authorization, the applicant or any State in which the facility would be located may file an appeal with the President, who shall, in consultation with the affected agency, review the denial or failure to take action on the pending application.

(B) Based on the overall record and in consultation with the affected agency, the President may

(i) issue the necessary authorization with any appropriate conditions; or

(ii) deny the application.

(C) The President shall issue a decision not later than 90 days after the date of the filing of the appeal.

(D) In making a decision under this paragraph, the

President shall comply with applicable requirements of Federal law, including any requirements of

(i) the National Forest Management Act of 1976 (16 U.S.C. 472a et seq.);

(ii) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(iv) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(v) the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

(7)(A) Not later than 18 months after August 8, 2005, the Secretary shall issue any regulations necessary to implement this subsection.

(B)(i) Not later than 1 year after August 8, 2005, the Secretary and the heads of all Federal agencies with authority to issue Federal authorizations shall enter into a memorandum of understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities.

(ii) Interested Indian tribes, multistate entities, and State agencies may enter the memorandum of understanding.

(C) The head of each Federal agency with authority to issue a Federal authorization shall designate a senior official responsible for, and dedicate sufficient

other staff and resources to ensure, full implementation of the regulations and memorandum required under this paragraph.

(8)(A) Each Federal land use authorization for an electricity transmission facility shall be issued

(i) for a duration, as determined by the Secretary, commensurate with the anticipated use of the facility; and

(ii) with appropriate authority to manage the right-of-way for reliability and environmental protection.

(B) On the expiration of the authorization (including an authorization issued before August 8, 2005), the authorization shall be reviewed for renewal taking fully into account reliance on such electricity infrastructure, recognizing the importance of the authorization for public health, safety, and economic welfare and as a legitimate use of Federal land.

(9) In exercising the responsibilities under this section, the Secretary shall consult regularly with

(A) the Federal Energy Regulatory Commission;

(B) electric reliability organizations (including related regional entities) approved by the Commission; and

(C) Transmission Organizations approved by the Commission.

(i) Interstate compacts

(1) The consent of Congress is given for three or

more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to--

(A) facilitate siting of future electric energy transmission facilities within those States; and

(B) carry out the electric energy transmission siting responsibilities of those States.

(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.

(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).

(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C) of this section.

(j) Relationship to other laws

(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National

Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Subsection (h)(6) of this section shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

§ 831c. Corporate powers generally; eminent domain; construction of dams, transmission lines, etc.

Except as otherwise specifically provided in this chapter, the Corporation--

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or

convenient in the transaction of its business, and may dispose of any such personal property held by it.

The Board shall select a treasurer and as many assistant treasurers as it deems proper: *Provided,* That any member of said Board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this chapter.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the Board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this chapter, and all such condemnation proceedings

shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings: *Provided,* That nothing contained herein or elsewhere in this chapter shall be construed to deprive the Corporation of the rights conferred by sections 3114, 3115, and 3118 of Title 40.

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

(k) Shall have power in the name of the United States--

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: *Provided,* That no transfer authorized herein in (b) shall be made without the approval of Congress: *And provided further,* That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: *Provided, however,* That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: *And provided further,* That no transfer authorized herein in (a) or (c) except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the Department of the Army and the President.

(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the chapter; and may cooperate with Federal, State, and local agencies to that end.

2

No. 07-658

1-22-08

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC), in exercising its authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, had authority to prohibit public utilities from exercising their state-granted eminent domain authority in a discriminatory manner when responding to electrical interconnection requests.

2. Whether FERC has authority to regulate the interconnection of electric generators to certain distribution-level transmission facilities, where such facilities are already subject to a FERC-filed tariff and the interconnection is for the purpose of making a FERC-jurisdictional wholesale sale of electric energy.

3. Whether the orders under review are impermissibly vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 475 F.3d 1277. The orders of the Federal Energy Regulatory Commission are reported at 104 F.E.R.C. ¶ 61,103, 106 F.E.R.C. ¶ 61,220, 109 F.E.R.C. ¶ 61,287, and 111 F.E.R.C. ¶ 61,401.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2007. A petition for rehearing was denied on June 20, 2007 (Pet. App. A37-A38). On September 11, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

November 19, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 201 of the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, gives the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. 824(b)(1). See *New York* v. *FERC*, 535 U.S. 1, 19-20 (2002). The States retain jurisdiction over "any other sale of electric energy" and "facilities used in local distribution" of electricity. 16 U.S.C. 824(b)(1). The FPA directs FERC to ensure that all rates and charges for (or in connection with) transmission services or wholesale electric sales subject to its jurisdiction, and all rules, regulations, or practices affecting such rates and charges, are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d, 824e (2000 & Supp. V 2005).

b. "Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). In 1996, the Commission adopted Order No. 888, which ordered the functional unbundling of wholesale generation and transmission services—that is, it required public utilities to announce separate rates for their wholesale gen-

eration, transmission, and ancillary services.[1] In particular, utilities were required to offer non-discriminatory, open-access transmission service, to take transmission service for their own wholesale sales and purchases under the same general tariff applicable to others, and to separate their transmission and generation marketing functions and communications. See *New York*, 535 U.S. at 11. FERC based Order No. 888 on its finding "that electric utilities were discriminating in the 'bulk power markets,' in violation of 16 U.S.C. 824d, by providing either inferior access to their transmission networks or no access at all to third-party wholesalers of power." *Ibid.* In *New York*, this Court upheld Order No. 888 in its entirety.

Order No. 888 did not directly address the interconnection of electric generating facilities and transmission facilities. The Commission recognized, however, that interconnection of generators to the grid was a critical component of open-access transmission service and was therefore subject to the basic requirement that public utilities offer comparable, non-discriminatory service under the terms of their FERC-filed open-access tariffs. See *Tennessee Power Co.*, 90 F.E.R.C. ¶ 61,238 (2000); *Standardization of Generator Interconnection Agree-*

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[1] See generally *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, 75 F.E.R.C. ¶ 61,080, at 61,238 (61 Fed. Reg. 21,540 (1996)), clarified, 76 F.E.R.C. ¶ 61,009, at 61,024, and 76 F.E.R.C. ¶ 61,347, at 62,646 (1996), orders on reh'g, Order No. 888-A, 78 F.E.R.C. ¶ 61,220, at 61,951 (62 Fed. Reg. 12,274 (1997)), Order No. 888-B, 81 F.E.R.C. ¶ 61,248, at 62,069 (1997), and Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

ments and Procedures, Order No. 2003, 104 F.E.R.C. ¶ 61,103, at ¶ 9 (2003), on reh'g, Order No. 2003-A, 106 F.E.R.C. ¶ 61,220 (2004), on reh'g, Order No. 2003-B, 109 F.E.R.C. ¶ 61,287 (2004), on reh'g, Order No. 2003-C, 111 F.E.R.C. ¶ 61,401 (2005). Initially, FERC addressed interconnection issues on a case-by-case basis, but that approach led to complex technical disputes about issues such as the feasibility of interconnection and responsibility for costs. See Order No. 2003, 104 F.E.R.C. ¶ 61,103, ¶¶ 10, 11. The delays caused by such disputes, the Commission found, "undermine[d] the ability of generators to compete in the market and provide[d] an unfair advantage to utilities that own both transmission and generation facilities." *Id.* ¶ 11.

2. In light of the inadequacy of a case-by-case analysis, the Commission decided to adopt standard interconnection procedures and a standard interconnection agreement. See Order No. 2003, 104 F.E.R.C. ¶ 61,103, at ¶ 12. After notice-and-comment rulemaking, the Commission issued Order No. 2003, which requires any public utility that owns, controls or operates facilities used for transmitting electric energy in interstate commerce to have on file with FERC, as part of its open-access tariff, standard interconnection procedures and a standard interconnection agreement applicable to all generators with a capacity of 20 megawatts or greater. See *id.* ¶ 11 & n.10.[2]

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[2] In a separate rulemaking, the Commission established interconnection procedures and a standard interconnection agreement applicable to small generators with a capacity of less than 20 megawatts that seek interconnection to the transmission system of a public utility. See *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 111 F.E.R.C. ¶ 61,220, on reh'g, Order No.

Order No. 2003 governs interconnections to any transmission facilities "that, at the time the interconnection is requested, may be used either to transmit electric energy in interstate commerce or to sell electric energy at wholesale in interstate commerce pursuant to a Commission-filed [open-access tariff]." Order No. 2003, 104 F.E.R.C. ¶ 61,103, ¶ 804; see Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶ 710; Order No. 2003-C, 111 F.E.R.C. ¶ 61,401, ¶ 51. Thus, the order applies to "interconnections to a 'distribution' facility" when two conditions are satisfied: (1) "the facility is included in a public utility's Commission-filed [open-access tariff]," and (2) "the interconnection is for the purpose of facilitating a jurisdictional wholesale sale of electric energy." Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶ 730.

The Commission acknowledged that, under 16 U.S.C. 824(b)(1), it generally does not have jurisdiction over "facilities used in local distribution." It explained that "distribution" is an "unfortunately vague term * * * usually used to refer to lower-voltage lines that are not networked and that carry power in one direction." Order No. 2003, 104 F.E.R.C. ¶ 61,103, ¶ 803. "Some lower-voltage facilities are 'local distribution' facilities not under [FERC] jurisdiction, but some are used for jurisdictional service such as carrying power to a wholesale power customer for resale and are included in a public utility's [open-access tariff]." *Ibid.* With regard to facilities that have a "dual use"—*i.e.*, facilities used both to deliver wholesale electricity for resale and to distribute retail electricity to end users—only the use of such facilities to facilitate a FERC-jurisdictional wholesale sale

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2006-A, 113 F.E.R.C. ¶ 61,195 (2005), on clarification, Order No. 2006-B, 116 F.E.R.C. ¶ 61,046 (2006).

would be subject to FERC jurisdiction; States would retain authority over uses subject to their jurisdiction. See Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶ 735. In adopting that interpretation of its jurisdiction under the FPA, the Commission explained, it was "asserting no jurisdiction beyond what it asserted in Order No. 888." See *id.* ¶ 705.

As part of its mandate of non-discrimination, Order No. 2003 requires a utility, when interconnecting with an unaffiliated generator, to use efforts similar to those it typically employs on behalf of its own or an affiliate's generators to secure land rights for the customer's interconnection facilities. Order No. 2003, 104 F.E.R.C. ¶ 61,103, ¶ 391. To obtain those rights, a utility might find it necessary to use the eminent-domain authority granted to it by a State. The Commission made clear, however, that "any use of eminent domain power must be in accordance with state law." Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶ 300. And a utility is required to use eminent domain to interconnect with an unaffiliated generator "only to the extent that it uses eminent domain to site Interconnection Facilities * * * for its own, or affiliated, generation." *Ibid.*

3. Petitioners—a group of state public utility regulatory commissions—sought review of Order No. 2003 and the orders following it. The court of appeals denied the petitions for review. Pet. App. A1-A24.

a. The court of appeals held that FERC had not exceeded its jurisdiction in regulating interconnections to facilities that are also used for local distribution. Petitioners relied on *Detroit Edison Co.* v. *FERC*, 334 F.3d 48 (D.C. Cir. 2003), in which the court had rejected FERC's attempt to assert jurisdiction over unbundled retail electricity transactions because such transactions

involved neither a wholesale sale of electric energy nor a transmission of electric energy in interstate commerce. In this case, by contrast, the court explained that "the issue is the inverse of *Detroit Edison*; Order No. 2003 applies to jurisdictional transactions only." Pet. App. A10.

The court of appeals also rejected petitioners' arguments that Order No. 2003 exceeded the limits of the Commission's FPA jurisdiction by regulating "certain facets of the engineering and construction of facilities needed for the relevant transmissions." Pet. App. A11. The court concluded that petitioners had identified "no specific aspect of the regulations that they claim is untethered to the Commission's authority over interstate transmissions and wholesale sales." *Ibid.* The court further noted that while the Commission's exercise of its ordinary and "indisputable" authority under the FPA might as a practical matter impinge on non-jurisdictional matters, "petitioners in this facial attack have identified no impingement that exceeds what may be encompassed in such conventional exercises of jurisdiction." *Ibid.*

The court of appeals likewise rejected petitioners' contention that FERC engaged in improper "jurisdictional 'boot-strapping'" by applying Order No. 2003 to interconnections to "dual-use" facilities (*i.e.*, facilities used for both FERC-jurisdictional and state-jurisdictional transactions). Pet. App. A14-A15. The court explained that FERC's exercise of jurisdiction is "the exact opposite of boot-strapping," since the Commission only asserted authority over interconnections to "distribution" facilities "when the facility is included in a public utility's Commission-filed [open-access tariff] *and* the interconnection is for the purpose of facilitating a juris-

dictional wholesale sale of electric energy." *Id.* at A15 (quoting Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶ 730).

Finally, the court of appeals rejected petitioners' challenge to the Commission's requirement that a public utility use reasonable efforts, similar to those it employs for its own or affiliated generators, to facilitate interconnections. Pet. App. A16-A19. Petitioners suggested that, because that requirement encompassed the exercise of eminent-domain authority, it amounted to federal "commandeering" of state eminent-domain power, contrary to *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). The court concluded, however, that Order No. 2003 is a "far cry from what the Supreme Court found objectionable in *New York* and *Printz*." Pet. App. A16. The order "bind[s] only utilities—not state officials," *id.* at A18, and even then, it does "nothing more than impose a nondiscrimination provision" on public utilities, *id.* at A17. The court emphasized that the order "explicitly leave[s] state law untouched." *Ibid.* "Thus the states remain completely free to continue licensing public utilities to exercise eminent domain, or to discontinue that practice," and "[n]othing * * * compels either continued state retention of the license, or public utilities' continued employment of eminent domain." *Id.* at A17-A18.

b. Judge Sentelle dissented in part. Pet. App. A24-A31. Although he agreed with the court's conclusion that FERC had acted within its jurisdiction in regulating distribution facilities, he disagreed with the decision to affirm the eminent-domain provisions of the order. In his view, "eminent domain is properly categorized as a 'substantial sovereign power' of the states, even when that power has been delegated to a public utility," *id.* at

A28 (citation omitted), and therefore FERC may not regulate the use of state eminent-domain power in the absence of a clear statutory authorization, *id.* at A30. According to Judge Sentelle, Order No. 2003 exceeds FERC's statutory authority because it "will require transmission providers either to forego the use of their state-granted eminent domain power altogether, or to use this power to condemn property on behalf of unaffiliated generators." *Id.* at A28.

ARGUMENT

In the orders at issue here, FERC acted reasonably to establish standard procedures to address the potential for undue discrimination by public utilities that own, operate, or control transmission facilities against competing electric generators seeking to interconnect to the grid. In so doing, the Commission crafted a limited nondiscrimination requirement related to a public utility's exercise of its state-granted eminent-domain authority—a requirement that does not intrude on the States' exercise and control of that power. Further, the Commission limited its jurisdiction over interconnections to facilities that are used in a FERC-jurisdictional wholesale sale and that are already subject to a FERC-filed open-access tariff. That is precisely the same jurisdictional determination that the Commission reached in Order No. 888, which this Court affirmed in *New York* v. *FERC*, 535 U.S. 1 (2002). The court of appeals therefore correctly upheld the Commission's orders. Its decision does not conflict with any decision of this Court or of any other court of appeals, and further review is not warranted.

1. Petitioners assert (Pet. 18-26) that the decision of the court of appeals allows FERC to interfere with the

States' sovereign powers of eminent domain. Petitioners are incorrect. As the court of appeals explained, "the orders here leave state law completely undisturbed and bind only utilities—not state officials." Pet. App. A18. In fact, Order No. 2003 does "nothing more than impose a non-discrimination provision on public utilities." *Id.* at A17. Specifically, it requires that if a State grants eminent-domain authority to a public utility, and if the public utility exercises its authority for the benefit of its own or affiliated generators, then the public utility must take the same action on behalf of independent generators. See Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶ 300.

According to petitioners (Pet. 21-23), that provision of Order No. 2003 allows FERC to "dictate" the manner in which State-granted eminent domain power is used. But as the court of appeals explained, Order No. 2003 does no such thing. Rather, it is a non-discrimination provision that has only an indirect effect on the exercise of eminent-domain powers. And the incidental effect on state authority "is surely no greater than (many would say dramatically less than) that of a federal command that, if a state hires employees for the performance of traditional governmental functions, it must pay them no less than a federally determined wage." Pet. App. A18; cf. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (holding that a requirement that States comply with the Fair Labor Standards Act is not "destructive of state sovereignty"). Petitioners cite various cases (Pet. 19) holding that a public utility acts as an agent of the State when it exercises eminent-domain authority, but the decision below is entirely consistent with that proposition. Order No. 2003 does not prohibit

or compel the exercise of eminent-domain power; it requires only non-discrimination.

Petitioners argue (Pet. 24-26) that FERC's order compels the States to enact and enforce a federal regulatory program, in violation of the Tenth Amendment as interpreted in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). The "commandeering" of state governments at issue in those cases involved "requir[ing] the States in their sovereign capacity to regulate their own citizens." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000). Order No. 2003, however, does not compel state officials to take any action or to enforce any of FERC's regulatory requirements. On the contrary, it requires that "any exercise of eminent domain by a public utility pursuant to the orders' non-discrimination mandate be 'consistent with state law.'" Pet. App. A17 (quoting Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, Large Generator Interconnection Agreement § 5.13; *id.* ¶ 300).[3] The order "does not require [States] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Condon*, 528 U.S. at 151. The court of appeals correctly held that "[t]he orders here are a far cry from what the Supreme Court found objectionable in *New York* and *Printz*." Pet. App. A16-A17.

2. Petitioners renew their contention (Pet. 26-36) that Order No. 2003 exceeds FERC's jurisdiction under the FPA. In their view, the Commission's assertion of jurisdiction over interconnections to "dual-use" distribution facilities is inconsistent with the divided federal-

[3] As a result, petitioners are incorrect when they suggest (Pet. 25) that FERC's order will require public utilities to broaden the use of eminent-domain authority beyond that authorized by state law.

state regulatory regime recognized by the statute. That claim lacks merit. In its orders, FERC exercised the jurisdiction granted to it under the FPA over transmission of electric energy in interstate commerce and wholesale sales of electric energy, and it fully respected the jurisdiction reserved to the States by the FPA.

Order No. 2003 applies only to distribution-level interconnections that involve transactions subject to FERC's jurisdiction under 16 U.S.C. 824(b)(1). As the court of appeals explained, the order governs interconnections to transmission facilities that also engage in local distribution only where the facilities in question are "included in a public utility's Commission-filed [open-access tariff]," Pet. App. A15, and "only insofar as the interconnections are for the purpose of making sales of electric energy for resale in interstate commerce," *id.* at A9 (quotation marks omitted). In other words, the Commission exercised its jurisdiction over interconnections to distribution facilities that also engage in state-regulated activity only where two criteria are met: (1) the facilities are already used for transmission of electric energy in interstate commerce (and are thus subject to a Commission-filed open-access tariff), and (2) the interconnection is directly connected to a wholesale sale. Both of those matters are explicitly within the Commission's jurisdiction under Section 824(b)(1). See *New York*, 535 U.S. at 16-17; *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 454 (1972); *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 523 (1945).

3. Petitioners err in suggesting (Pet. 26-36) that the decision below conflicts with several decisions of this Court and other courts.

a. Although petitioners mention it only in passing, this Court's decision in *New York*—and the underlying

decision of the court of appeals in *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*)—fully support the court of appeals' decision here. In *New York*, the Court considered FERC's Order No. 888, which asserted jurisdiction under Section 824 to regulate—and apply open-access requirements to—unbundled retail transmission of electricity. 535 U.S. at 11-12; see *TAPS*, 225 F.3d at 691. Recognizing that such transmission may take place over distribution-level facilities that had traditionally been under exclusive state regulation, the Commission adopted a seven-factor test to determine whether such a facility is one that meets the FPA's legal definition of "local distribution" (and thus remains under state regulation) or is engaged in interstate transmission (and thus is subject to FERC jurisdiction). See *New York*, 535 U.S. at 12 n.9; *TAPS*, 225 F.3d at 695-696. The court of appeals in *TAPS*, and subsequently this Court in *New York*, upheld FERC's jurisdictional determinations in all respects.

Here, the Commission did nothing more than exercise the same jurisdiction that it asserted in Order No. 888 with regard to distribution-level facilities. See Order No. 2003-A, 106 F.E.R.C. ¶ 61,220, ¶¶ 699, 705, 731 (explaining FERC's adherence to the jurisdictional conclusions reached in Order No. 888). The standard procedures and agreement of Order No. 2003 will apply to an interconnection to a distribution-level facility only if that facility is already subject to a Commission-filed open-access tariff, pursuant to FERC's jurisdiction under Order No. 888, *and* the interconnection is for the purpose of making a wholesale sale. FERC correctly concluded that applying the interconnection rules to facilities already subject to a FERC-filed open-access tariff would

"properly respect the jurisdictional bounds recognized by the courts in upholding Order No. 888." Order No. 2003-C, 111 F.E.R.C. ¶ 61,401, ¶ 51. Further exercising caution to ensure that it was acting within its FPA jurisdiction, the Commission appropriately required that the distribution-level interconnection be for the purpose of making a jurisdictional wholesale sale. See *TAPS*, 225 F.3d at 696 (Section 824(a) "makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used.").

In addition to upholding the basic jurisdictional determinations that FERC followed here, *New York* also confirms the Commission's ability to draw reasonable lines to define the extent of its own jurisdiction over wholesale sales and interstate transmission. See *New York*, 535 U.S. at 16-17. The Commission's decision to tie its exercise of jurisdiction over interconnections to both its FPA jurisdiction over transmission of electric energy in interstate commerce (by requiring that the distribution-level facility already be subject to a FERC open access tariff), and to its FPA jurisdiction over wholesale sales, is the essence of reasonable line-drawing. Cf. *Niagara Mohawk Power Corp.* v. *FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006) ("[I]n drawing the jurisdictional lines in this area, some practical accommodation is necessary."), cert. denied, 127 S. Ct. 2129 (2007).

b. Petitioners assert (Pet. 31-32) that the decision of the court of appeals is inconsistent with that court's prior holding in *Detroit Edison Co.* v. *FERC*, 334 F.3d 48 (D.C. Cir. 2003). Even if petitioners were correct, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, as the court of appeals explained, this case is the exact opposite

of *Detroit Edison*. There, FERC approved a tariff that would have placed unbundled retail *distribution* service (as opposed to *transmission* service) under FERC jurisdiction. 334 F.3d at 51-52. The court of appeals was unconvinced by FERC's claim in that case that FERC could assert jurisdiction over all services occurring on facilities used for both wholesale and retail distribution, since the retail distribution service FERC asserted authority over "involved neither jurisdictional sales nor jurisdictional transmission." Pet. App. A10. Here, by contrast, FERC applied Order No. 2003 "to jurisdictional transactions only." *Ibid.*[4]

c. Petitioners further assert (Pet. 28-30) that the decision of the court of appeals conflicts with the Eleventh Circuit's decision in *Southern Co.* v. *FCC*, 293 F.3d 1338 (2002). That case did not involve the FPA, which the court addressed only in dicta. See *id.* at 1344. Its discussion of the statute simply pointed out that regulation of local distribution facilities is "primarily in the hands of state and local authorities," *ibid.*, an unremarkable proposition that is fully consistent with the decision below.

4. Finally, petitioners suggest (Pet. 36-38) that the Commission's order is arbitrary and capricious because, in their view, it does not specify what distribution-level

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[4] In their discussion of *Detroit Edison*, petitioners also contend (Pet. 32-36) that by including certain construction, equipment, and engineering requirements in its standard interconnection procedures and agreement, FERC is asserting jurisdiction over the actual physical distribution facility itself, rather than just the interconnection transaction. The court of appeals correctly rejected that argument, explaining that petitioners had identified no requirements of Order No. 2003 that are not directly connected to FERC's undisputed authority over interstate transmission and wholesale sales. Pet. App. A11. Petitioners point to no such requirements here.

facilities are subject to an open-access tariff and are therefore covered by Order No. 2003. Although petitioners do not identify the precise basis for their challenge, they appear to be arguing that the order is arbitrary because it is unreasonably vague. That claim lacks merit. As the court of appeals noted, the Commission acknowledged that while there was some potential for uncertainty, most cases would present no controversy, and in the event of a dispute the Commission would rely in the first instance on public utilities to provide the necessary information, with the Commission resolving any further disputes. Pet. App. A15. The court determined that the record revealed "no grounds for upsetting the Commission's judgment" on that point. *Ibid.* That case-specific conclusion does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,

v.

THE FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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(1996), on reh'd, Order No. 888-A, F.E.R.C. Stats. & Regs. 31,048, 62 Fed. Reg. 12,274, clarified, 79 F.E.R.C. 61,182, 1997 WL 257595 (1997), on reh'g, Order No. 888-B, 81 F.E.R.C. 61,248 (1997) WL 833250 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. 61,046, 1998 WL 18148 (1998)-----2, 12, 13
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ARGUMENT

The *Petition for Certiorari* (*Petition*) points out the crucial distinctions at the heart of this appeal. First, the difference between acting pursuant to a statutory grant of authority and acting in defiance of crystal clear Congressional and Constitutional proscriptions. Second, the difference between exercising jurisdiction over *transactions* and exercising jurisdiction over local distribution and generation *facilities*, a distinction the Circuit below easily recognized in a decision that predates the one before the Court in this proceeding.[1]

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[1] Whatever else *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) decided, it clearly recognizes, and relies upon, the fundamental distinction between jurisdictional *facilities* and jurisdictional *transactions*. Citing, inter alia, *New York v. FERC*, 535 U.S. 1, 23 (2002), the panel states at *Detroit Edison*, 334 F.3d at 50 that:

> FERC created a seven-factor test to determine whether a given facility is a local distribution facility (over which FERC has no jurisdiction) or a transmission facility (over which FERC does have jurisdiction.)

After defining State-jurisdictional *local distribution facilities* – the panel, Id. at 51, effectively distinguishes the exercise of jurisdiction over *transactions* over such facilities from the exercise of jurisdiction over the facilities themselves:

> "When a *local distribution facility* is used to deliver energy to an unbundled retail customer, *FERC lacks any statutory authority*, and the [S]tate has jurisdiction over that *transaction*. . . . By contrast, when a local distribution facility is used in a wholesale *transaction*, *FERC has jurisdiction over that transaction* pursuant to its wholesale

No one contests that FERC has jurisdiction over wholesale power *transactions*. No one contests that FERC has a statutory obligation to remedy undue discrimination *in jurisdictional transactions*. But neither charge can give FERC authority to compel the exercise of State eminent domain authority or to override Congress' mandate that the agency "*shall not* have jurisdiction . . . over *facilities* used for the generation of electric energy or over *facilities* used in local distribution." 16 U.S.C. § 824(b)(1) {emphasis added.}

The D.C. Circuit's failure to recognize these distinctions raises serious constitutional concerns and conflicts with precedent from this Court and others. FERC's eight page "argument" fails to rebut petitioners' contentions that certiorari is warranted. *FERC Opposition* (*FERC Opp.*) at 9-16. With few

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jurisdiction under FPA § 201(b)(1). . . . FERC asserts that Midwest's distribution facilities are FERC-jurisdictional because they are used for both wholesale and retail distribution. Id. at 54. . . . FERC's position contradicts the plain language of the FPA. Section 201(b)(1) denies FERC jurisdiction over "facilities used in local distribution." . . . FERC would rewrite the statute to exclude only "facilities used *exclusively* in local distribution." Such an interpretation would eviscerate [S]tate jurisdiction over numerous local facilities, in direct contravention of Congress' intent. . . . Moreover, the orders under review totally ignore Order 888's carefully formulated seven-factor test for distinguishing between local distribution facilities and "FERC-jurisdictional facilities," which this Court ultimately approved." {emphasis added and internal citations not shown}.

exceptions, FERC does little other than quote or restate the rationale of the opinion below (or its own *Order*) rather than responding directly to petitioners' critiques of the legal deficiencies and internal contradictions that augur for review.

I. FERC PROVIDES LITTLE OR NO RESPONSE TO PETITIONER CLAIMS THAT REVIEW IS CRITICAL TO ADDRESS CONSTITUTIONAL CONCERNS AND CONFLICTS WITH PRECEDENT RAISED BY FERC'S ORDER COMMANDEERING STATE EMINENT DOMAIN AUTHORITY.

FERC dismisses petitioners' extensive exegesis of FERC's usurpation of State eminent domain authority and related constitutional concerns, *Petition* at 15-26, by quoting, with virtually no elaboration, its original order and the majority's rationale below.[2] It argues that FERC is

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[2] FERC quotes the Court (which itself is basically quoting FERC statements below) that "Order No. 2003 does "nothing more than impose a non-discrimination provision on public utilities." *FERC Opp.* at 10. However, FERC's charge to remedy discrimination can not override *specific statutory limits* on its jurisdiction. In an analogous circumstance, the Federal Communications Commission argued "the nondiscrimination principle that motivated the 1996 Telecommunications Act mandates that the FCC prohibit a utility from "favor[ing] itself over other parties with respect to the provision of telecommunications or video programming services." *Southern Company v. FCC*, 293 F.3d 1338, 1346-1347 (11th Cir. 2002). That Court conceded that "the principle of nondiscrimination is the primary purpose of the 1996 Act," but, significantly, then notes that courts (and agencies):

> "must construe statutes in such a way as to 'give effect, if possible to every clause and word. . . {internal citation omitted}. . . . ***By***

only regulating a public utility, and there is only an "incidental effect" on the States. In FERC's eyes no "compulsion" occurs. *FERC Opp.* at 10-11.

FERC does not address the obvious conflict between the D.C. Circuit's rationale and the decisions of this Court and other Circuits cited in the *Petition* at 2-3, 19-20 and in Judge Sentelle's dissent below. FERC simply ignores these cases, presumably because they establish that a utility has no authority to exercise eminent domain for its own generation unless the State authorizes and conditions such authority. See, e.g., *Handley v. Cook*, 252 S.E.2d 147, 149 (W. Va. 1979). See also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 368 n.1 (1974) (Marshall, J. dissenting).

FERC does not address the fundamental flaw noted in the *Petition* at 21-23, that neither FERC nor the Court below have referenced *any* provision of the Federal Power Act, which grants FERC or independent generators eminent domain authority or authorizes FERC to determine the manner in which State-granted authority should be exercised. With no statutory authorization, FERC cannot, and does not, explain why *Order No. 2003* and the decision below are not contrary to this Court's

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attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they do not apply, the FCC is subverting the plain meaning of the act." *Southern Company*, 293 F.3d at 1347. {emphasis added}.

That is precisely what the FERC and the Court below have done in the case at bar.

holdings in *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) and *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986), which preclude a federal agency from preempting sovereign State powers unless Congress has conferred such authority on the federal agency with *unmistakable clarity*.

FERC does not dispute that utilities will have to seek State authority for eminent domain rights for independent generators in certificate proceedings, which are legislative in nature. *Petition* at 25. Instead, FERC baldly alleges that its requirement that utilities exercising eminent domain authority for their own generation also exercise that authority on behalf of independent generators, does not "compel" either [1] the exercise of eminent domain power or [2] States to take any actions to enforce the FERC's requirement.[3] This statement ignores reality and is internally inconsistent.

State mechanisms and officers *are* compelled to enforce FERC's scheme. An "independent generator's" request for the use of eminent domain, like other exercises of condemnation authority, could be (and undoubtedly often will be) challenged or contested in State tribunals. Even if uncontested, State procedures, and often State courts, will be

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[3] See *FERC Opp.* at 10-11 arguing *Order No. 2003* "does not compel [S]tate officials to take any action or to enforce any of FERC's regulatory requirements. . . ." nor "require [S]tates to enact any laws or regulations, and it does not require [S]tate officials to assist in the enforcement of federal statutes regulating private individuals."

used to implement and enforce this FERC scheme.[4] Moreover, FERC's rationale implies that, rather than being compelled, States have a "choice" - either [1] authorize the use of eminent domain for both the utility's generation and for any independent generator that requests it, or [2] not authorize it for *any* generation. *FERC Opp.* at 10-11. But neither choice is constitutionally permissible. See *New York v. United States*, 505 U.S. 144, 175-76 (1992).

FERC cannot *direct States to implement its policy*. It cannot *require* States to authorize utilities to exercise eminent domain *on behalf of, and at the request of*, independent generators. *New York*, 505 U.S. at 175-176.

The second choice contains a similar constitutional frailty. FERC cannot effectively *deprive* States of the right to exercise their sovereign power of eminent domain to allow State-regulated utilities to take property for public use. As this Court declared in *City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912):

> the right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to [S]tate governments, without which they could not well perform their great

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[4] See, e.g., Alaska Stat. § 09.55.290 (eminent domain proceedings may be commenced in superior court); Alaska Stat. § 09.55.310 (jury or master hearing); Alaska Stat. § 09.55.320 (right to jury trial for appeal); Alaska R. Civ. P. 72 (procedures for eminent domain actions).

> functions. It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, a law authorizing it, and provision made for compensation.

In any case, prohibiting the use of State eminent domain authority to site new utility electric generation plants (unless FERC's requirements are followed) is not an option for either utilities or State commissions. Utilities' are subject to State public service obligations. States have a statutory duty to ensure that the utilities can provide reliable service. Neither can forgo the use of eminent domain and still comply with these responsibilities. It is also bad policy. If States cannot act, it is only a matter of time before there are serious power shortages. FERC lacks authority to ensure the construction of sufficient electric generation.[5]

II. FERC'S FLAWED REASONING HIGHLIGHTS THE NEED TO REVIEW THE AGENCY'S EXERCISE OF AUTHORITY OVER STATE-JURISDICTIONAL GENERATION AND LOCAL DISTRIBUTION FACILITIES DESPITE 87 YEARS OF CONFLICTING PRECEDENT AND CLEAR STATUTORY PROSCRIPTIONS.

At pages 11-12 of its *Opposition*, FERC purports to respond to the *Petition's* 10-page

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[5] See *Petition* at 7-9, 22-23. The only Federal Power Act provision authorizing eminent domain for generation facilities is unique to hydroelectric generation. See 16 U.S.C. § 814.

explanation, *Petition* at 26-36, of why *Order No. 2003* exceeds FERC's jurisdiction under the FPA. The *Petition* notes that FERC's assertion of jurisdiction over *physical interconnections*, i.e., actual facilities, because they are "dual-use" *distribution* facilities is fundamentally inconsistent with the *Detroit Edison* decision, as well as the regulatory regime specified by the statute and confirmed by previous decisions of this Court. FERC's two paragraph discussion contends that its assertion of jurisdiction over *physical interconnections* to local distribution facilities is *limited* to the use of such facilities to facilitate a FERC-jurisdictional transaction – a wholesale sale. *FERC Opp.* at 11-12.

Petitioners' argument turns on the critical distinction between jurisdictional "facilities" and jurisdictional transactions – yet FERC dismisses this argument in less than a paragraph of conclusory statements that conspicuously all but avoids discussing "*facilities*" and, instead, concentrates entirely on "interconnections" and, later references to all aspects of wholesale transactions as a basis for rejecting Petitioners' concerns. *Id.*

FERC *never* provides a convincing explanation of how its words can be squared with the FPA's specific mandates, or indeed, some of its own statements. See Order No. 2003-C at footnote 42, where the FERC explains that, "when a "dual use" facility is involved in a wholesale sale, we do not claim jurisdiction over the *facility itself*, just the wholesale sale transaction occurring over that facility. See *Detroit Edison*, 334 F.3d at 51

{emphasis added}[6] Basically, FERC contends that requiring a carrier to condemn property for the construction of *what must be State jurisdictional facilities* (otherwise, State eminent domain authority cannot exist) does not amount to "claiming jurisdiction over the facility itself," but is mere "interconnection." Nor is, apparently, FERC's effort to exert federal jurisdiction over siting, construction, procurement, and the physical link between generating and local distribution facilities. See *e.g.*, *Petition* at 10-11

FERC cannot, and does not, adequately explain how it hurdles the textual limits on its *transaction-based* wholesale jurisdiction to obtain the right to control physical alterations to an otherwise State-jurisdictional *facility*. But even if it could, FERC *nowhere* provides a convincing explanation for how its jurisdiction can attach to State-jurisdictional facilities, ***which it flatly concedes may never actually be used in a wholesale transaction***.[7] In Order No. 2003-A,

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[6] Compare *Petition* at 31 and footnote 1 supra. Earlier, Petitioners pointed out the differences between the decision below and the *Detroit Edison* panel's reasoning. FERC's response is to simply recite the flawed contention, adopted below, that Petitioners identify "no requirements of Order No. 2003 that are not directly connected to FERC's undisputed authority over interstate transmission and wholesale sales." Since apparently both FERC and the D.C. Circuit agree that FERC has no authority to require modifications, changes or siting of State jurisdictional facilities, it is not surprising that neither chose to directly address the examples cited on brief and in the record below where FERC asserts such authority.

[7] See, Order No. 2003-C at Para. 51 & 53.

FERC specifies that a generator seeking interconnection doesn't have to present an actual wholesale contract, or even any evidence of its intent to engage in jurisdictional sales at the time of interconnection.[8] Why? According to FERC: "if the Interconnection Customer decides that it will not sell its power at wholesale it would then be subject to [[S]tate jurisdiction and [S]tate jurisdictional charges."[9]

The fact that a generator may intend to sell power at wholesale at some point in the future cannot provide FERC with jurisdiction over the physical interconnection to the State-jurisdictional facility. Only after the distribution facility is constructed can there be a transaction that triggers FERC's wholesale sales jurisdiction. As the D.C. Circuit found in *DTE Energy et al v. FERC*, 394 F.3d 954, 963 (D.C. Cir. 2005) when examining the validity of FERC's assertion of jurisdiction over certain facilities: "the historical purpose or *alleged intended use* of the facilities does not speak to the [jurisdictional classification] issue at hand, which is their present primary function." {emphasis added}

Even if a wholesale transaction occurs, FERC, as noted earlier, leaps from regulating a financial transaction to regulating the physical

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[8] See, Order No. 2003-A at Para. 737 ("We will not require an Interconnection Customer seeking interconnection to facilities. . . to tender proof of a wholesale sale to secure interconnection service").

[9] *Id.*

facility via the *Order's* construction, procurement and engineering specifications. FERC does have jurisdiction over actual wholesale sales transactions that take place over otherwise State-jurisdictional facilities. However, it is impossible to read the statute to allow *FERC to order physical changes to the underlying State jurisdictional facilities – even after* it is clear that FERC-jurisdictional transactions will occur. FERC's authority simply does not reach physical interconnections between generation and local distribution plant.

FERC also argues the D.C. Circuit's decision, and *Order No. 2003*, are not inconsistent with 87 years of precedent from this and other federal and State Courts. *Petition* at 26-36; *FERC Opp.* at 11-14. The flaws in this segment of FERC's analysis are obvious.

FERC cites this Court's decision in *New York v. FERC,* noting correctly, that Petitioners only cite this decision in passing. According to FERC, the *New York* decision, and the underlying circuit court opinion in *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), "fully support the court of appeals' decision here." This argument is facially unsound.

In *New York,* this Court considered FERC's *Order No. 888* and established a seven-factor test to determine whether a facility meets the statutory definition of "local distribution" (and remains subject to State jurisdiction) or is a transmission facility subject to FERC jurisdiction. Petitioners suggested below that FERC was obligated to utilize this Court-

approved test to implement the agency action at the heart of this appeal.[10] FERC declined to do so. Instead, it opted for a dual jurisdictional theory that – at least applied to State-jurisdictional facilities – is facially inconsistent with the test endorsed by this Court in *New York*.

The *Petition* demonstrates the clear distinction in *New York* (and *Detroit Edison*) between FERC's jurisdiction over transactions and its lack of jurisdiction over distribution facilities. In those cases, FERC did not purport to, *and in fact did not*, exert, directly or indirectly, authority over physical plant classified as local distribution under the seven-factor test. *New York*, 535 U.S. at 22-23. While the language of *Order No. 2003* pays lip service to this established jurisdictional divide, that *Order* actually exercises regulatory authority over State-jurisdictional distribution facilities. Cf. *Petition* at 10-11, 32-34.

The last distinction between *New York* and the case at bar is evident from FERC's *Opposition*. *New York* addressed FERC's jurisdiction to adopt an open access requirement over facilities for the unbundled retail transmission of electricity; it did not address the *novel* issue presented here - jurisdiction over the physical interconnection between generation and distribution facilities. The *Opposition* points this crucial distinction out – while attempting to argue that the opposite is true. At page 3, FERC recognizes that *Order No. 888*, (the subject of the *New York* decision) "did *not* directly

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[10] NARUC, et al. Initial Brief at the D.C. Cir. Appeal at 23-25; NARUC, et al. Reply Brief at the D.C. Cir. Appeal at 6-8.

address the interconnection of electric generating facilities and transmission facilities" as does *Order No. 2003*. *FERC Opp.* at 3. But, after essentially conceding this distinction between its own two decisions (and necessarily also the differences between *New York* and the case at bar), at 13, it asserts that *Order No. 2003* is, after all, consistent with *New York,* because it asserts "nothing more" than the *same* jurisdiction as to distribution-level facilities. *FERC Opp.* At 13-14. It cannot be both.

This pattern of flawed analysis, conclusory statements, and logical inconsistencies permeates the remainder of FERC's *Opposition*, but we lack the space to address them here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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